Office - Supreme Court, U.S.
FILED
OCT 21 1957
JOHN T. FEY, Clerk

No. 572

In the United States Court of Appeals

For the Seventh Circuit

No. 11903

MINNIE KRANTMAN,
Plaintiff-Appellant,

vs.

LIBERTY LOAN CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
J. Sam Perry,
Trial Judge.

APPENDIX TO APPELLEES' BRIEF.

MARTIN J. McNALLY
111 West Washington Street
Chicago, Illinois
Attorney for David B. Lichtenstein and Lyle S. Woodcock

ANDREW J. DALLSTREAM
FREDRIC H. STAFFORD
231 South La Salle Street
Chicago 4, Illinois
Attorneys for D. J. Harris and David S. Nerad

THOMAS C. STRACHAN, JR.
WALTER I. DEFFENBAUGH
33 North La Salle Street
Chicago, Illinois
Attorney for I. H. Levy

JOHN F. CASHEN, JR.
64 West Randolph Street
Chicago, Illinois
Attorney for Liberty Loan Corporation

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Abstract of Testimony of Witnesses:

Boutell, Wayne Struve 1

Levy, I. H. 1

Maland, Oswald 6

Krantman, Minnie 7

Lichtenstein, David B. 8

Costigan, Edward J. (Deposition) ..... 2[illegible]

Colloquy on Oral Argument 25

APPENDIX.

ABSTRACT OF TESTIMONY OF WITNESSES.

The following abstracts are deemed necessary to correct inaccuracies and to supply omissions in the Appendix to Appellant's Brief. For convenience, they are grouped under references to pages in Appellant's Appendix.

TESTIMONY OF WAYNE STRUVE BOUTELL (Tr. 66)

Cross Examination by Mr. McNally (Tr. 92).

The computations that I made were taken wholly out of the proxy statement (Plaintiff's Exhibit 3) that was sent to the stockholders of Liberty before the Plan of Merger, and out of the Baumann-Finney audit (Plaintiff's Exhibit 20) (Tr. 95).

TESTIMONY OF I. H. LEVY

Direct Examination by Mr. Stevens (Tr. 201).

Appellant's Appendix, p. 8:

* * * In March, I went to St. Louis on Liberty's business and I talked to Mr. Lichtenstein at my hotel (Tr. 205). He told me he couldn't make any kind of commitment about coming to Liberty because he was employed by American Investment Company, and therefore he could not consider any kind of a proposition (Tr. 205-6). * * * There was somewhat of a discussion of the sale of half of my shares of stock, but he said he wasn't in any position because he was still employed by American (Tr. 206). * * * There was a discussion at the meeting on May 26 of the sale of part of the shares of stock held by me

to Lichtenstein and also a discussion of the reclassification of the 7500 shares of B stock into 100,000 shares of common. There was no discussion about obtaining the cooperation of brokers in soliciting A stockholders (Tr. 209). In March, 1954, I had a discussion in Mr. Nix's office with Mr. Nix, Mr. Harris, Mr. Costigan, and also with Mr. Thompson and Mr. Gerhard of Seaboard Finance Company, regarding a deal with Seaboard during which there was some discussion about Lichtenstein coming with Liberty and I informed them that Lichtenstein had told me he wasn't interested as long as he was in the employ of American (Tr. 210-11). * * *

There was a discussion of whether it would be practical for Lichtenstein and myself to divide the Class B stock, one-half to each, and also a discussion of a reclassification of the stock. Mr. Maland, of Chapman and Cutler, advised me that I should not be a party in any way to any reclassification of the B stock, and the deal was off. Upon Costigan's suggestion that he should buy all the B stock of my group and my family, Maland said, "That is entirely up to Mr. Levy, if he wants to do that, to go ahead and do it". (Tr. 212-3).

Appellant's Appendix, p. 9:

Mr. Dolliver, President of Family Finance, said they were willing to pay $1,800,000 for the B stock "which would be the management control of the company" and then merge with Liberty (Tr. 215). Mr. Barnes of American Investment Company talked to me about the same time concerning the purchase of the B stock for $1,700,000, which would give them management control of Liberty (Tr. 216). * * * I didn't inform Strilky of the price I was getting for my shares. He figured that out himself. He knew what the total price was, $1,700,000 (Tr. 222) * * *.

I purchased 9 shares of B stock from Fairman, Harris & Company, who said that they had come on the market and asked if I wanted to buy them. I think I paid $230 per share. This occurred subsequent to the option agreements of July 8 and prior to November 3, 1954 (Tr. 223; 225; 246). I purchased 43 shares of B stock which had come on the market in March or April of 1954 at $20 or $21 per share (Tr. 223; 246-7), but these shares didn't mean anything to me because my wife and daughter and I had the management control of the company. It just came into the market. I didn't need it (Tr. 223).

Appeliant's Appendix, p. 10:

In this industry we depend a great deal on bank credit and borrowing power from banks and insurance companies and on acquainting security dealers with the value of our securities. At the present time Liberty has a net worth of about $8,500,000. Its lines of credit with bankers are over $29,000,000 and we are borrowing about $25,000,000 to $26,000,000. We are also borrowing from insurance companies about $6,500,000. To summarize, banks and insurance companies have four times more money invested in Liberty's business than its stockholders (Tr. 225-6). We have two audits a year and reports are sent to the banks and insurance companies and it has been my job as a part of the top management to call upon the banks and insurance companies and answer all questions that they have about the business. These borrowings from the banks and insurance companies are all unsecured and without collateral. The First National Bank of Chicago gives a $2,000,000 line of credit, the Continental $1,250,000, the Northern Trust $750,000, the Harris Trust $500,000 and there are many smaller banks. We have lines of credit in St. Louis, Detroit, Cleveland, New York, Phila-

delphia and Washington (Tr. 226-7). Since Lichtenstein came into the picture our business has greatly expanded so that we need new lines of credit, which is part of my job (Tr. 227-8) * * *. We keep a file in St. Louis on the banks so that we can follow them up. We want many banks to know about the company because it is expanding and growing and we are constantly looking for new funds. This is a money business (Tr. 230).

Lichtenstein wanted me to stay and also Strilky and H. H. Levy (Tr. 231-2). * * *

I have a private office in Liberty's offices at 111 West Jackson Boulevard. I also have a secretary who does a lot of other work around the Liberty office too (Tr. 234). * * *

Appellant's Appendix, p. 11:

There was no discussion about reserving any salary for Lichtenstein until the disposition of this suit or as to what the amount would be (Tr. 253).

Appellant's Appendix, p. 12:

Prior to the date when Lichtenstein informed Maland that they were forming Key Finance Corporation, I believe I had only one conversation with Lichtenstein about the sale of my interest. This was May 27 when there was a discussion of the purchase of all the shares (Tr. 256). Prior to that date we were exploring different things, but Lichtenstein always informed me that he could not discuss anything so long as he was employed by American (Tr. 257). It was all exploratory and never became serious until May 26 after he was no longer employed (Tr. 259). * * * I had another discussion with Lichtenstein in February, but the B shares weren't even mentioned (Tr. 260).

Those proxies were all voted in favor of the merger and reclassification of shares except that where the proxies indicated that the stockholder wanted to vote against the merger and reclassification, such proxies were so voted. The proxies that were not designated one way or another were voted in favor of the reclassification and merger, as was stated in the Proxy Statement (Tr. 262).

Appellant's Appendix, p. 13:

A lot of bankers know Mr. David Lichtenstein, know his reputation as a small loan operator, and he enjoys a very fine one (Tr. 275).

I met with Mr. Lichtenstein a number of times prior to May 26, 1954, but we did not discuss the sale of stock at all of those meetings. We discussed generalities and what could be worked out if he came with Liberty. I was very anxious to get him to join Liberty, but he kept informing me he was still employed with American (Tr. 283). At one of those meetings we may have discussed his purchase of some of this B stock, but we never got serious on anything until May 26 (Tr. 287-8).

Appellant's Appendix, p. 14:

Cross Examination by Mr. Strachan (Tr. 288).

I knew that as part of the terms of the merger on which I voted as a Class A stockholder the B stock was to be reclassified (Tr. 288-9). * * * My wife and I and daughter had approximately two-thirds of the B stock and would have received about 40,000 shares of the Seaboard preferred (Tr. 291).

Severance arrangements were worked out for both Strilky and H. H. Levy (Tr. 294).

The deal which I negotiated and carried out with Key Finance Company did not involve any reclassification of the B stock (Tr. 295).

Appellant's Appendix, p. 15:

Cross Examination by Mr. McNally (Tr. 296).

I knew also that the Class A holders got one share of new common for each share of Class A. At the time I voted, my wife, my family and I had approximately 15,000 shares Class A having a market value in excess of $350,000 (Tr. 297).

TESTIMONY OF OSWALD MALAND

Direct Examination by Mr. Stevens (Tr. 298).

My reasoning for recommending that Levy not sell any part of his stock unless he sold it all was that he had a deal pending on Seaboard which I thought was legally sound and more desirable from his standpoint than the deal that was presented. A question was raised as to why I would approve the Seaboard deal and would not approve a participation by Mr. Levy to recapitalization. I stated that I thought there was a difference between a recapitalization under the Delaware law and a merger, and that under a merger proceeding, if a Class A stockholder objected, he could get a cash compensation for the fair value of his stock, whereas that was not true under the recapitalization as proposed (Tr. 300) * * *. I don't recall any discussion about the position of A stockholders in connection with the reclassification of 7,500 shares to 100,000 shares. * * * There was no definite or prolonged discussion of hazards in recapitalization and I don't recall whether it was 100,000. In discussing hazards of reclassification I said I thought there was substantial hazard in a reclassification procedure (Tr. 301). * * *

Appellant's Appendix, p. 16:

Cross Examination by Mr. McNally (Tr. 302).

I knew about all of the earlier deals with other companies which Levy seriously considered. I don't recall the exact figures, but Mr. Levy undoubtedly does and I certainly would rely on the figures as he represents them (Tr. 303-4).

Recross Examination by Mr. McNally (Tr. 306)

The Proxy Statement was submitted to Mr. Adolph Johnson of our office by Mr. Levy (Tr. 306).

TESTIMONY OF MINNIE KRANTMAN

Cross Examination by Mr. McNally (Tr. 313).

Appellant's Appendix, p. 18:

I don't know and never did know whether there is any misrepresentation in the Proxy Statement, Plaintiff's Exhibit 3 (Tr. 328-9). * * * I never told Mr. Shulman to buy Liberty Loan stock or any other kind of stock (Tr. 331) * * *. I can't read right now and I am not the best reader anyway (Tr. 334).

"Mr. McNally: I will be glad to read it to her.

Mr. Stevens: Go ahead."

The letter read to the witness is from Quail & Co., brokers, to Louis Shulman, dated September 1, 1954, and stated in part, "Enclosed is the latest Standard and Poor's write-up on Liberty Loan. To bring it up to date, Liberty now is in the process of merging with the Metropolitan Loan and Investment Company of St. Louis and in the process of getting rid of their convertible preferred and their Class B Common Stock. It is Mr. Lichtenstein's desire to have only one class of common stock * * *. This stock does seem to have an excellent growth factor, though

immediate results can frankly only be hoped for, but with the recapitalization completed and mere mergers considered, growth should be rapid. * * *" (Tr. 335-6). Mr. Shulman discussed this letter with me after the suit was filed, but I can't remember whether it was after or before. I don't think it was before (Tr. 339).

Appellant's Appendix, p. 19:

My dividend checks are all that I am interested in (Tr. 346) * * *. I never communicated with or tried to find or talked to any other Class A stockholders of Liberty (Tr. 347).

TESTIMONY OF DAVID B. LICHTENSTEIN

Direct Examination by Mr. Stevens (Tr. 348).

The first discussion of a stock option plan which I had with Mr. Levy occurred during one of his conversations with me about coming into Liberty (Tr. 349). The general principles of such a plan were discussed with both Levy and Costigan (Tr. 350) * * *. The persons I named were those persons who were coming in with me (Tr. 351). * * * The list which is included in plaintiff's Exhibit 8 was the final list. That list as adopted is not the same as the one submitted to the Board. (Tr. 352) * * *. The names of I. H. Levy, H. H. Levy and Strilky were on the list presented to the Board (Tr. 353).

Appellant's Appendix, p. 20:

My wife's funds have not substantially come from me (Tr. 355). All of the money which she has was made by her own investments from a little money she had when I married her (Tr. 356).

Appellant's Appendix, p. 21:

I talked to Mr. Buford about coming into Liberty before he became a director and I also talked to him about investing in the purchase of B shares of Liberty before he became a stockholder of Key (Tr. 364). * * * Mr. Buford and Mr. John Wilson talked to August A. Busch, Jr. Wilson is Financial Vice President of Anheuser Busch (Tr. 364). * * * I did not talk to Alfred Fleishman, who owns 22 shares of Key. I presume Mr. Buford did (Tr. 365).

Appellant's Appendix, p. 22:

Key Finance still owns the 7241 shares of Liberty B stock acquired in July 1954. It has acquired no other stock (Tr. 367).

The Proxy Statement was prepared by lawyers in Mr. Dallstream's office, but I did read it and tried to read it carefully (Tr. 368).

It would be sort of a misrepresentation to put in the notice that 7500 shares of Class B would be reclassified into 100,000 shares of common because there is so much more contained on the very next page about the plan. The next page says:

> "The plan in substance provides for the conversion of Class A common stock of the corporation into common stock of the surviving corporation on a share-for-share basis, the conversion of 7500 shares of Class B common stock of the corporation into 100,000 shares of the common stock of the surviving corporation, restricted as to dividends as hereinafter provided, the conversion of 2,074 shares of the capital stock of Metropolitan into 20,469 shares of the common stock of the surviving corporation, and the conversion of 100 shares of the capital stock of Metro

into 2730 shares of the common stock of the surviving corporation." (Tr. 369-70)

The notice says:

"Your attention is directed to the attached proxy statement and exhibits which afford you further information concerning the matters to be acted upon at the meeting."

I am sure I discussed what should be on the first page and certainly we would not have put on a fragment of the information (Tr. 370-1). * * *

I dispute the fact that as a result of the merger the 7500 B shares are increased in equity from about $125,000 to $1,400,000, as of the figures in the Proxy Statement, because you are dividing up the company and all of the money belongs to the common stockholders, and you can figure out what one share is worth but nobody has a right to take any part of the money and part of the capital and say, "Well, this belongs to this group". Nobody has a right to do that in any corporation to my knowledge (Tr. 376). There wouldn't be any B stock after the merger. The equity for one share of B stock before the merger as compared with the resulting shares issued for such one B share after the merger is given on page 10 of the Proxy Statement. It talks about all of the stock (Tr. 377). * * * I don't think you can pick out 13⅓ shares and say so much equity belongs to them, but I do think you can pick out the book value of one share and the market value of one share. (Tr. 378) * * * Mr. Stevens also described briefly what the nature of the suit was, complaining about the merger and reclassification of stock and complaining about the Employees Stock Purchase Plan (Tr. 383).

Appellant's Appendix, p. 23:

In meetings with both Levy and Costigan prior to June, 1954, I had always said that I didn't believe Liberty could attract any executives into the company as long as they had the B stock and that they would have to eliminate it.

I do not recall any details being worked out prior to June (Tr. 386). * * * In other words, so long as the Class B stock existed it was possible for Liberty to be controlled by the owner of a majority of the B stock regardless of the amount of the other outstanding stock, and that situation made it impossible to attract executives and top personnel who could never hope to have any major part of control of the company (Tr. 387). * * * I never heard of B stockholders being willing to eliminate their B shares by converting them into A shares on a share for share basis, either as Key Finance or Mr. Levy (Tr. 388-9). Even though the B stock had the same rights of liquidation and the same dividend rights, its right of ownership gave it greater value. The B stock could even sell the company, could sell the assets, and force a liquidation (Tr. 389).

Of the 173,091 shares of A stock for which dealers were paid at the rate of 15¢ per share, between 30,000 and 40,000 such shares did not have any dealers stamp on the proxies; however, the dealers claimed that such shares belonged to their customers and claimed the fee so that as a public relations matter and so as not to ruin the relationship of Liberty with dealers all around the country, Liberty paid the 15¢ per share fee on these shares as well (Tr. 392).

The only thing I can recall ever saying to Costigan concerning the use of security dealers was that in the Ohio Finance deal which occurred some five years previous the dealers were paid for their work in soliciting

and I could have said, and perhaps I did say, that I presume the set-up would have to be similar to what was done in Ohio Finance (Tr. 394). I don't believe I ever talked about it after that. There is nothing unusual in such practice in mergers and matters of that kind. It is a common practice (Tr. 395).

Appellant's Appendix, p. 24:

My general policy was deviated from in connection with H. H. Levy and Louis Strilky because I could assure myself that they would not go into business and compete and take a lot of employees with them plus a lot of customers (Tr. 396) * * *. I don't think that the 20% stock held by Barnes by itself was sufficient to control the directors of American Investment (Tr. 398).

As a mathematical matter anybody can multiply 13⅓, which is mentioned in the Proxy Statement in a number of places, for example page 7, where it says that each share of Class B Common Stock will be converted into and exchanged for 13⅓ shares of Common Stock of the surviving corporation, by $14.17, which is stated on page 10 of the Proxy Statement as being the value per share of the common stock after the merger and after giving effect to the Employees' Stock Plan (Tr. 403-5). * * * I do not think you can take a group of stockholders and segregate them after there is one class of common stock (Tr. 405). * * * I think the figures would be correct if there were a liquidation on the basis of the figures stated in the Proxy Statement, but we did not go into this company to liquidate it (Tr. 407-9). The Proxy Statement says very plainly, in chart form on page 10 that is so easy to see, just what the book value figures would be (Tr. 409). * * *

Appellant's Appendix, p. 25:

But I can find the value upon liquidation of the 100,000 shares exchanged for the Class B shares (assuming liquidation and book value to be the same) by taking the per share basis. I do not think it takes an accountant to multiply 100,000 by $14.17, which is the book value of one share after the merger (Tr. 411-12). * * * The book value of all the shares after the merger was changed (Tr. 413).

"Mr. McNally: Mr. Stevens, is it not simpler to put it as it was in the proxy statement per share? Mr. Lichtenstein will have to multiply it. It is there per share on page 10 and it is there in the proxy statement.

The Court: The proxy statement shows it per share. How many shares were there?

Mr. McNally: It shows it right there on the same page.

The Court: There is no harm in asking him the question. Let him multiply it. (Tr. 416).

* * *

The Court: Since he has stated he does not know, if you wanted something accurate, it is set out in the statement at so much a share, give him the number of shares and the amount, and let him multiply it so you will have the record clear. * * *

The Court: You have two things. First you have the Class A shares, that you are asking him. That was at a fixed price. What was that? Multiply that. Then the same number of Class A shares—

Mr. Stevens: After.

The Court: —at the new book value after the merger, and what was that? (Tr. 417).

Mr. Stevens: Yes, that is exactly.

The Court: And then you have your difference.

Mr. Stevens: That is it exactly.

The Court: Your theory of the case is that there was a dimunition of the one and an increase of the other, based on book value.

Their theory of the case is that it is a matter of determining the value and that the book value is not the true and correct value because of the element of ownership.

Mr. Stevens: That is right.

The Court: Ownership and control (Tr. 418).

* * *

By Mr. Stevens:

Q. Mr. Lichtenstein, during the recess you have been making some computations as to the book value of the 449,606 shares before and after the merger, have you not? (Tr. 419) * * *

The Court: Isn't the important thing how much it shrinks per share?

Mr. Stevens: That isn't the only thing.

The Court: That is a matter of arithmetic, the rest of it, isn't it? If it shrinks so much, if there is a shrinkage, if you assume there is a shrinkage at so much each share, it is a matter of arithmetic, your client lost so much, if there was a loss, and each other shareholder lost proportionately, and if there was a gain the B shareholders gained proportionately. Your complaint now is that that was not totalized?

Mr. Stevens: That is right. They don't present the whole picture to the shareholders.

The Court: They didn't present it and say this is going to be the total book value before and this will be the total book value after? * * *

I just want to get your theory.'' (Tr. 421-2).

* * *

(The witness, continuing): I suppose I could have taken the 449,606 figure and multiplied by $14.17 per share if

I wanted to, but it doesn't apply; I don't think it is comparable before and after the merger. (Tr. 423).

* * *

"Mc McNally: But the body of stockholders can now, if they ever see fit, dispose of Mr. Lichtenstein and his management". (Tr. 425)

(The witness, continuing): There is no dollar comparison of the dividends before and after because they did not know whether the dividends would be the same or would be increased (Tr. 430). The dividend explanation is perfectly plain in the proxy statement. It states at page 9, after pointing out that the 100,000 shares exchanged for the B stock could only receive 7½% of the dividend on the non-restricted common stock until after 90¢ a share has been earned for a period of six months on all of the outstanding stock, "Thereafter such 100,000 shares of common stock will be entitled to receive dividends on the same basis as the other outstanding shares of common stock of the surviving corporation". In the financial statements on page F-6 the dividends paid on the Class A stock for prior years are shown at the rate of $1.50 per share (Tr. 432), also the dividends paid on the Class B stock for prior years at the rate of $1.50 per share (Tr. 433). The proxy statement says that after the restriction has been removed the dividends on the 100,000 shares will be on the same basis as the other stock. (Tr. 433)

"By Mr. Stevens:

Q. Yes, but nowhere in there is the figure $150,000 as such mentioned as a dividend for the 100,000 shares, is it?

The Court: Counsel, those are matters that they look at and determine.

Mr. Stevens: Well, all right. That is right.

The Court: The total is there. Your complaint on that score is that they didn't total it up and say this, that and the other. They have given the breakdown rates—

Mr. Stevens: That is right.

The Court: —so that the person who looks at that or has his counsel look at it would be able to determine these figures. I could determine it myself, because the breakdown figures are there.

Mr. Stevens: Yes.

Mr. McNally: There is also a very complete explanation in the long paragraph at the top of page 11 immediately following the table on page 10. (Tr. 433-4)

Cross Examination by Mr. McNally (Tr. 441).

Appellant's Appendix, p. 26:

These employees did not get their stock for nothing; they paid $17 a share and have a contract to pay the balance of the stock that is partially paid. We doubted whether Liberty could have sold the stock for $17 a share; after paying commissions, it would have gotten something less because they had sold preferred stock for less, and the company was not in as good a condition as when it sold the preferred (Tr. 441). * * * The price to the employees was below the market value on 100 shares, but not much, and if you take off commissions that would have to be paid to dealers it would come to something less than $17. (Tr. 442) * * * They could not sell the stock until after they got it and then not until 30 days thereafter (Tr. 444).

"The Court: Let's see. He could not sell—if he contracted for 100 shares he would not until the end of the five year period and the 30 days thereafter, he would not be able to sell any part of the 100 shares, is that right?

The Witness: No. That is not quite right.

The Court: Then if he contracted for it and he paid up part of it and some of it was issued to him as he went along, then 30 days after it was issued to him, he could?

The Witness: That is correct. (Tr. 445)."

Appellant's Appendix, p. 27:

The Board of Directors voted to permit me to have, on my coming into the company and bringing the groups that I brought in, 68,000 shares of stock, and they also under the plan authorized me to designate other members of my family or family trusts to take such part of the shares provided they pay for it, and that is what I meant by designation in replying to Mr. Stevens' questions concerning the portions of the 68,000 shares taken by my wife and the trusts for my two sons (Tr. 446-7).

In all the time I have worked I never did fix my own salary and I accepted what the directors gave me. * * * If the Board wants to fix less than $72,000 a year it is all right with me (Tr. 448). * * * I said that their top executives would have to reduce their salaries so as to afford sufficient funds to pay the executives that we were bringing in. We scaled it down that way.

The Court: So what your plan was that the over-all expenses in the future would not exceed what it had in the past, is that right?

The Witness: For the executive salaries.

The Court: How would you take care of your salary? (Tr. 449)

The Witness: I would have to earn it first, and that is one reason I did not take any salary, because we were working on the 90 cents. This year there is the possibility that I would be entitled to salary if the board so desires to give it, because we are earning about 50 per

cent more in total dollars than Liberty ever earned in its life.

The Court: There was no contract or agreement, though, that you are not entitled to salary until you had earned the 90, was there?

The Witness: No, sir, that was voluntary on my part (Tr. 450).

(The witness, continuing): These publications included information as to Metro, Metropolitan, the Employees' Stock Plan and all the other elements. All of the transactions attacked by this suit were covered (Tr. 454).

Appellant's Appendix, p. 28:

Starting July 20, 1954 we opened additional offices and put in an immediate training program, which Liberty did not have, to educate young men to be office managers, then later supervisors and other officials (Tr. 455). * * * The sales finance business required an entirely new training program for many of the men, mostly old Liberty employees, because it was a different type of business (Tr. 456). * * * We have put in $6,500,000 worth of subordinate notes sold to insurance companies in this country, and we have just closed a deal for a million dollars on a junior subordinate note, which enables us to borrow more from the banks. * * * We have signed commitments with some of the leading insurance companies for $8,500,000 worth of senior notes (Tr. 457). The banks and the insurance companies have about three times as much money in this business as the common stockholders have (Tr. 458). * * * The banks and insurance companies receive our regular audit reports, special reports which they request, and frequent personal calls from our representatives. The banks and insurance companies complimented us in regard to the plan and merger and said we were

doing a fine job and that it was the thing to do to make Liberty grow (Tr. 459). * * * Outstandings are the accounts receivable, which are the earning assets of the company (Tr. 461). * * * The stock of Liberty has done better market value wise than other companies in the industry because Liberty is a growth company and is so recognized by investors and by brokers all around the country (Tr. 462). * * * People are buying Liberty stock for appreciation (Tr. 463).

Cross Examination by Mr. Strachan (Tr. 464).

Appellant's Appendix, p. 29:

American Investment Company was willing to pay $1,700,000 for the Class B stock in 1950 and 1951 (Tr. 465). In 1953 American was willing to pay $1,500,000 for the Class B stock, which price was not acceptable to Mr. Levy and he refused it (Tr. 466).

We have not paid salaries to any person that did not work for them. I would not be a party to such an agreement (Tr. 467).

* * *

Liberty had had no prior contact with this Chicago insurance company (Tr. 468). * * * Mr. H. H. Levy's contract was terminated in accordance with its terms when he came down with a very severe cancer (Tr. 469).

Mr. Strilky does have a following because he knows the personnel in and around Chicago and Wisconsin. He could have damaged the company if let out and it wouldn't have been fair to let out a sick man without considering the approximate 30 years spent with the company. His work was in Chicago (Tr. 471). * * * A major part of the company's work is in Chicago, only the executive offices being in St. Louis (Tr. 472).

The purchase of B stock by Key Finance did not involve in any way a reclassifiscation of the B stock into

common stock or any other reclassification. There were no agreements whatsoever. * * * When we started, Liberty was in 6 or 7 states (Tr. 473).

Redirect Examination by Mr. Stevens (Tr. 474).

Appellant's Appendix, p. 30:

Each share of stock purchased under the Employees' Stock Plan had equal voting rights with every other share of stock as prescribed by the Delaware statute (Tr. 474). The $2.19 earnings per share as of May 31 was also for the five months of this year, and based on all the shares including the 100,000 shares and all the employees' stock that had been issued (Tr. 475). On eighty some thousand shares of employees stock only 1/17th had to be earned (Tr. 475).

Loan companies such as Commercial Credit and CIT Finance Corporation are not in our field (Tr. 477). * * * Many brokers have told me that our stock had responded better than any of the other stocks in the industry. There may be an exception, but I don't know what it is. Household went up and came down again and may be about the same as 1954 (Tr. 478-9).

DEPOSITION OF EDWARD J. COSTIGAN

Direct Examination by Mr. Stevens (Tr. 488).

We might have had 25,000 shares in the hands of our customers in 1954 (Tr. 490). * * *

Appellant's Appendix, p. 31:

There were a lot of other things our firm did; among others, we helped to bring out a class of stock that had full voting rights and to restore the voting power to the common stockholder, and we also helped in the exchange

of the Class B stock for the common stock (Tr. 493). The proxy statement contained factual information. Possibly some of our salesmen could have presented the information so that the stockholder would understand what was in the proxy statement, if you know what I mean (Tr. 495). * * * Customers are different, and you can't generalize on it (Tr. 497). There has been no additional compensation received by and no promise of additional compensation given to Edward D. Jones & Co. (Tr. 498). We never expected to receive compensation for assisting in the sale of the B stock from Levy and his family to the group headed by Lichtenstein (Tr. 499). The only compensation that we could ever have expected to get and which was never decided on until the very last minute was the $7500 and the 15¢ a share (Tr. 501).

Appellant's Appendix, p. 32:

I was not active in the Seaboard negotiation * * * I am not familiar with any arrangement that as part of the sales agreement Mr. Levy was to get a $40,000 a year salary for five years (Tr. 504). * * * Lichtenstein wanted to work out a basis of compensation because he wanted to keep Levy's services, but it was a very general conversation about possible compensation (Tr. 506-9).

In April, 1954, there probably was a discussion of a requirement that the Class B shares be reclassified into approximately 100,000 common shares (Tr. 514-5). * * * Maland was afraid of the Class A stockholders and satisfying them because a recapitalization would be required (Tr. 530).

Appellant's Appendix, p. 33:

Both Riter & Company and Fairman and Harris had in 1954 a large number of customers and had a number of the Class A stockholders of Liberty (Tr. 536). * * * Mr.

Nix was opposed to about everything we were doing and not against any particular question (Tr. 537). The reason he was opposed to Mr. Lichtenstein coming into the picture was because it would have interfered with his Seaboard Finance deal (Tr. 539). * * * I might have mentioned to Mr. Nix in New York in March that there might be some compensation to dealers for soliciting proxies (Tr. 542-3). It was necessary to reclassify the B stock in order to put the voting power in the hands of the A stockholders and to provide management, and Lichtenstein would not have put up $1,700,000 to come into Liberty without the idea of working toward a reclassification of the stock. I imagine Lichtenstein told me that; it could have been mentioned in a very general way at our first meeting in March, 1954. Mr. Levy was not present. I don't remember having said to either Mr. Harris or Mr. Nix that reclassification was a condition (Tr. 544-5). At the Chicago Club in the latter part of May, 1954, I don't know that I said anything to Mr. Nix other than the fact that in order to provide management, outstanding management that Lichtenstein provides, Lichtenstein would not come in unless this B stock were out of the way and the voting power was in the hands of the Class A or the common stockholder; that you would never attract good management into a company with the capitalization the way it then existed so that in order for Lichtenstein to pay $1,700,000 and come out, you had to have 100,000 shares, which then was about the market value of the other stock which was around $17 a share (Tr. 546).

Appellant's Appendix, p. 34:

Mr. Harris was not opposed to the reclassification of 7500 shares to 100,000 shares. I think he was in hopes that there might be a lower figure (Tr. 548). He did not really feel that way. It was sort of a trading attitude

(Tr. 549). Nix' opposition was against everything having to do with the plan. His whole idea was dragging his feet in hopes he could have the Seaboard deal (Tr. 549-50). * * * Everybody knew that the dividends were $1.50 on the B stock. I don't think Lichtenstein and I discussed that the total dividend on the B Class was $11,250. Everybody knew that it was $1.50 times 7500. (Tr. 553-4).

Cross Examination by Mr. McNally (Tr. 555).

My wife and I and some of my sisters owned Class A stock before the reclassification and had held it for some years prior to July, 1954. Jones & Co. had sold about 25,000 shares of Class A stock to customers (Tr. 556). * * * When Lichtenstein in the early part of 1954 was on leave of absence from American, I did everything I could to try to get him into the management of Liberty because I consider him the outstanding man in the industry. The Class A stockholders would be very lucky to have a man like him identified with Liberty. I consider management 95% of any operation. That was my primary interest in trying to bring Lichtenstein into Liberty (Tr. 557). I have been in the business since 1937; our firm has handled small loan securities back to 1932. We handled a lot of Ohio Finance securities which eventually went into American Investment. I saw how Ohio fared with poor management and when it went into American I saw how very well they did. I got to know Lichtenstein well as a result of it (Tr. 558). * * * The regard and respect of the investment men and commercial bankers extended to his outstanding managerial ability, establishing training programs with personnel, opening new offices. People in his organization have the highest regard for him. Being identified with American Investment and Ohio Financing over the past years, we naturally learned that, because we have to know what we are selling. We consider management

95% of whether a company is going to succeed or fail. Our brokerage concern is still dealing in Liberty stock and the sales are substantially greater than before. Possibly 75,000 shares are in the hands of our customers. We have sold a terrific amount (Tr. 559-60).

Cross Examination by Mr. Strachan (Tr. 561).

Appellant's Appendix, p. 35:

Mr. Levy has a reputation for making desirable acquisitions for a company. * * * He still is Chairman of the Board, having been elected and re-elected at each annual meeting of directors (Tr. 562).

Redirect Examination by Mr. Stevens (Tr. 564).

The 4,000 shares owned by my relatives and myself were Class A shares (Tr. 564-6). * * * Before Mr. Lichtenstein came into Liberty, the company was not making good progress in the increase of its receivables like other companies were doing in the industry. In fact, their receivables were going off a little (Tr. 568). This was a very poor showing by comparison with other small loan companies in the industry for the preceding year. The company was not showing the growth that we wanted and therefore we thought it imperative that a man of Lichtenstein's ability be brought in; and when he became available, that is what we wanted. * * * Mr. Levy could not do everything (Tr. 569). He is a hard worker, he does a good job and is a great man for Liberty; but our organization was not deep enough in management all the way through, all the way down to the managerial level, in order to provide the kind of growth that we wanted. Bringing in Lichtenstein and his group of managers and executives would give us the kind of management we wanted, and we got it (Tr. 570). * * * Liberty primarily lacked depth all the

way down through its organization. This lack of managerial talent in addition to executive talent was a very important consideration (Tr. 571).

Recross Examination by Mr. McNally (Tr. 578).

My favoring of the plan was not motivated by a selfish interest of my own as to what I or my firm might receive in the way of any dealer's fee, but rather by what was best for the Class A stockholders (Tr. 579).

Recross Examination by Mr. Strachan (Tr. 580).

Our primary interest was to get the management in for Liberty. I thought that the interests of the Class A stockholders would be better served by this plan of bringing in management than by combining Liberty with a company like Seaboard. * * * The same growth possibilities did not exist in Seaboard (Tr. 581).

COLLOQUY ON ORAL ARGUMENT.

"Mr. McNally: Barrett v. Denver Tramway Corporation, 146 F. 2d 761, establishes first the rule which I know the Court knows, and that is that the applicable law in this case, the law that governs, is Delaware law.

The Court: I don't think anybody will dispute that—

Mr. McNally: No.

The Court: —but what the law is Delaware law, it being a Delaware corporation.

Mr. Stevens: So far as the substantive law is concerned, there is no question about it.

The Court: I think that goes without saying.

* * *

Mr. Stevens: Of course, this Court has general equity powers. I say the general equity powers of the Court still prevail here, but we should consider the Delaware law.

* * *

The Court: I don't think there is any question about the law. He has to establish fraud. That is his whole complaint.

Mr. Stevens: That is right." (Tr. 606-8)

Office-Supreme Court, U.S.
FILED
OCT 2 1957
JOHN T. FEY, Clerk

No. 57.2

In the United States Court of Appeals

For the Seventh Circuit

No. 11903

MINNIE KRANTMAN,
Plaintiff-Appellant,

vs.

LIBERTY LOAN CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable J. S[illegible]n Perry, Trial Judge.

APPENDIX TO APPELLANT'S BRIEF.

IRWIN J. ASKOW
RICHARD JAMES STEVENS
BURTON H. YOUNG
7 South Dearborn Street
Chicago 3, Illinois
Attorneys for Plaintiff-Appellant

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Statement of Proceeding Below 1-3

Decree 37

Opinion 38

Findings of Fact and Conclusions of Law 40-59

Notice of Appeal 60

Abstract of Testimony of Witnesses:

- Gillies, Coll 5
- Boutell, Wayne Struve 5
- Levy, I. H. 7-13
- Maland, Oswald 15
- Krantman, Minnie 17
- Lichtenstein, David B. 19-29
- Costigan, Edward J. (Deposition) 31-35

Certificate of Clerk 61-64

APPENDIX.

STATEMENT OF PROCEEDING BELOW.

Date Description.

10-20-54—Proceedings instituted by filing of Complaint.

10-27-54—Order by Judge Perry for leave to plaintiff to amend Complaint heretofore filed by attaching the verification of Minnie Krantman.

11- 9-54—Plaintiff's Supplemental Complaint filed.

11-10-54—Order by Judge Perry to extend the time to file Supplemental Complaint and Motion, Answer or other pleadings to original and Supplemental Complaint.

12-10-54—Motion to Dismiss filed by Liberty Loan Corporation.

12-10-54—Motion to Dismiss filed by certain other defendants.

3-15-55—Order by Judge Perry insofar as the Complaint and Supplemental Complaint embody the plaintiff's request for individual relief, they be and are dismissed.

3-15-55—Order by Judge Perry that Motion of several defendants to Dismiss be denied. Defendants to file pleading within 20 days.

3-29-55—Order by Judge Perry granting leave to defendants to file Motion to Reconsider Order of March 15, 1955, denying defendants' Motion to Dismiss.

3-29-55—Motion of defendants filed pursuant to Rule 12(h) of the F.R.C.P. to reconsider the Court's Order of March 15, 1955 for want of jurisdiction.

5-16-55—Order by Judge Perry that Motion of defendants for reconsideration of the Court's Order of March 15, 1955 be and it hereby is overruled and that all defendants file an appropriate responsive pleading within 20 days.

5-27-55—Motion of defendants to strike allegations and prayers of the Complaint filed.

6-24-55—Order by Judge Perry to strike out the words "on her own behalf" in paragraph 1 of Complaint and remainder of Motion to Strike denied. Defendants given 30 days to file Answer.

7-25-55—Answer of defendants filed.

9-22-55—Amendment to Complaint and Supplemental Complaint filed.

9-22-55—Brief in support of Amendment to Complaint filed.

10-12-55—Brief in opposition to Amendment to Complaint and Supplemental Complaint filed.

10-21-55—Plaintiff's Reply Brief filed.

11-10-55—Order by Judge Perry overruling contentions of defendants without prejudice to defendants raising the same matters at the close of all the evidence.

11-25-55—Answer to Amendment to Complaint and Supplemental Complaint filed.

1-12-56—Order by Judge Perry to Dismiss Anthony A. Buford, William A. Gerard and Allen J. Nix as defendants on Motion of plaintiff.

6-15-56—Cause called for trial. On Motion of Richard James Stevens order by Judge Perry that Louis Shulman be admitted to practice in this Court for the purpose of participating as

counsel for plaintiff in the trial of this cause. Opening statements heard. Evidence heard for plaintiff in part and cause continued to June 18, 1956 for further trial.

6-15-56—Depositions of Edward J. Costigan, Minnie Krantman and Louis Shulman filed.

6-18-56—Further evidence heard for plaintiff and cause continued to June 19, 1956.

6-19-56—Further evidence heard for plaintiff and cause continued to June 20, 1956.

6-20-56—Further evidence heard for plaintiff and plaintiff rests.

On Motion of defendants to Dismiss, Order by Judge Perry that the cause be dismissed on its merits. Defendants to submit proposed findings of fact and conclusions of law on or before July 10, 1956. Plaintiff to file objections thereto within 20 days thereafter, taken under Rule 13. Decision set for September 4, 1956. Plaintiff's Motion for new trial taken under advisement.

6-27-56—Order by Judge Hoffman that leave be given to plaintiff to file instanter a Motion for a New Trial. Said Motion is set for hearing September 4, 1956 at 1:30 P.M. before Judge Perry.

6-27-56—Motion for New Trial filed.

9- 4-56—Objections to defendants' proposed findings of fact and conclusions of law filed.

9- 4-56—Order by Judge Perry denying plaintiff's Motion for a New Trial. Findings of fact and conclusions of law entered.

9-20-56—Notice of Appeal filed by plaintiff.

9-20-56—Cost Bond on appeal filed.

10- 1-56—Clerk's File Copy of Transcript of Proceedings had on June 15, 18, 19 and 20, 1956, before Judge Perry filed by official court reporter.

ABSTRACT OF TESTIMONY OF WITNESSES.

COLL GILLIES, called as a witness on behalf of the plaintiff, being first duly sworn was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 41)

My name is Coll Gillies. I live at 2101 Lunt Avenue, Chicago. I am Vice President of The First National Bank of Chicago. I was served with a subpoena to produce the collateral trust agreement involving The First National Bank and Key Finance Co. (Plaintiff's Ex. 1) This document was executed in my presence on the date it bears. (Tr. 42) Among the contents of my file I have a certified copy of the Articles of Incorporation of the Key Finance Corporation (Plaintiff's Ex. 2) (Tr. 43) We do not have any stock certificates of Liberty Loan Corporation on deposit. On February 25, 1955, they were returned to the depositors. (Tr. 44) The trust agreement terminated on that date by payment in full of the notes that were due to Levys from Key. (Tr. 45)

WAYNE STRUVE BOUTELL, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 66)

My name is Wayne Struve Boutell. I live at 1002 North Gary Court, Wheaton, Illinois. I am a certified public accountant with Alexander Grant & Co. I am a principal. At the present time I am manager of the Tax Department. I received my license as Certified Public Accountant in November, 1948, and have been engaged in the profession

of Public Accounting 11 years. I had schooling both at the University of Southern California and University of Chicago. I hold a Bachelor degree, a Master's degree and a C.P.A. My accounting experience in general is dealing with corporations of various types and sizes in the corporate and tax field. (Tr. 67) That involves the analysis of financial statements, balance sheets, profit and loss statements. I examined, at Mr. Stevens' request, the proxy statement, Plaintiff's Exhibit 3, in some detail. We made a number of charts as a result of our computations. The information was taken from the proxy statement. (Tr. 68) * * * In addition to examining the proxy statement I also examined in detail the Baumann Finney & Co. audit of Liberty Loan Corporation for the year ending December 31, 1954, Plaintiff's Ex. 20. The Baumann Finney & Co. report showed that some of the assumptions in the proxy statement were not entirely carried out by the stockholders, and thus there was some variation between the proxy statement and what actually occurred. (Tr. 79) Generally speaking, the majority of preferred shares were converted into common shares. There were, however, approximately 5604.6 shares that were redeemed rather than converted into Class A stock. 58,000 of the former preferred stock shares were converted to Class A. I have made computations of the balance sheet of Liberty Loan Corporation, first as of June 30, 1954, to show the exact number of shares that existed and the equity attributable to each group of shares as of June 30, 1954. (Tr. 80) The first paragraph labelled "1" of Plaintiff's Ex. 23, are computations made by me based upon the June 30, 1954 audit included in the proxy statement, Plaintiff's Ex. 3. (Tr. 81) The figures shown under the Equity column show the equity which is properly attributable to the shares that are indicated in the left-hand column. The preferred stock is set out at redemption value—$16.00

per share; the common Class A and Class B are set out at book value. The part headed "2" on the first page of Plaintiff's Exhibit 23 contains my computations, taking the June 30, 1954 figures and the actual redemptions that were made during the six months ended December 31, 1954 and adding the employees' stock. It is a recomputation of the book value of Class A remaining and the Class B, and sets out the employees' stock (Tr. 82) purchase shares and the book value per share. The computations appearing under Section 2 of Plaintiff's Ex. 23 were taken directly from Exhibits 3 and 20. The item marked "3" on the second page contains computations made by me, based upon information contained in the Baumann Finney & Co. report as of December 31, 1954. The number of shares of stock appearing under the column headed "Shares" is actually the number of shares outstanding as of December 31, 1954. (Tr. 83) The figures shown under the column "Equity" are computations made by myself in a proper manner from an accounting viewpoint. The Book Value per Share column at the right-hand side are computations made by me on information contained in the December 31, 1954 Baumann Finney & Co. audit, Plaintiff's Ex. 20. (Tr. 84) I would say that I have had experience with corporations having around 4,000 stockholders. That includes the examination of corporate minutes and corporate structure. I have come in contact professionally with twenty-five or more of such corporations. (Tr. 89) I have an opinion based upon my connection with those corporations and upon my professional training and background as to approximately the percentage of holding of common shares which would constitute effective control of a corporation with about 4,000 stockholders. (Tr. 90) My opinion is that somewhere in the range of 30% would constitute effective control. (Tr. 91) In connection with assisting counsel in this pro-

ceeding, we met to discuss the case before the filing of the original Complaint. We had several meetings. I studied material and discussed various accounting and financial aspects of the case and made a number of calculations. After the Complaint was filed I suggested that we prepare these charts. (Tr. 92)

Cross Examination by Mr. McNally. (Tr. 92)

I have not been paid for any services. I did not have anything to do with the suit American Investment Company v. Lichtenstein (Tr. 93). That suit was mentioned in the proxy statement. I have not worked on other cases of this kind in connection with Mr. Shulman. You are not to understand that I did this work purely on a contingent basis. I am going to render a bill to Mr. Stevens, attorney for the plaintiff. (Tr. 94) I did not talk to anyone else about this case other than Mr. Stevens or his firm. I did not find any misrepresentation as to accounting matters in the proxy statement. I read the proxy statement and as far as my qualification goes, I did not find any misrepresentation (Tr. 95) I would have to check my records to know how long prior to October 20, 1954, I had been working on the case. I keep a time record of my work. I did not bring it with me. I was not prepared to prove up accounting fees. (Tr. 96)

I. H. LEVY, one of the defendants called as a witness at the instance of the plaintiff, under Sec. 43, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 201)

My name is I. H. Levy. I live at 3500 Lake Shore Drive, Chicago, Illinois. I am Chairman of the Board of Directors of Liberty Loan Corporation. In November of 1953 I had some discussions with David Lichtenstein about the

sale of Liberty to American Investment Co. (Tr. 202) I had a discussion with Lichtenstein in February of 1954 at the LaSalle Hotel in Chicago (Tr. 203) I told him that if there was a chance of him leaving American I would like to discuss with him his coming into Liberty. (Tr. 204) In March I went to St. Louis and talked to Mr. Lichtenstein at my hotel. (Tr. 205) He told me he couldn't make any kind of commitment. Probably in the latter part of March, 1954, I had a conversation with Lichtenstein at his home when Mr. Costigan was present. There was discussion of the sale of half of my shares of stock but he wasn't interested in it. (Tr. 206) On May 26th I first had a discussion with Lichtenstein in Chicago about a stock option plan. (Tr. 207) That conversation took place at the Chicago Club in the presence of Mr. Costigan, Mr. Nix and Mr. Harris. (Tr. 208) There was a discussion of the reclassification of the 7500 B stock into 100,000 shares of common. (Tr. 209) In March, 1954, I had a small discussion with Mr. Nix, Mr. Harris, Mr. Thompson and Mr. Gerhard in Mr. Nix's office, that I had seen Mr. Lichtenstein and he told me he wasn't interested as long as he was with American. I attended a meeting in Mr. Maland's office with Mr. Costigan and Mr. Harris and Mr. Lichtenstein and Mr. Maland. (Tr. 211) on May 27, 1954.

There was a discussion of the reclassification of the Stock and Mr. Maland advised me that I (Tr. 212) should not be a party in any way to any reclassification of the B stock and the deal was off. Maland said "I think you should go ahead and merge with Seaboard". He did not say anything about the advisability of a merger if there was going to be a reclassification. (Tr. 213) I had had previous negotiations with Seaboard Finance Corporation from March to the end of May. The reclassification of 7500 shares of B stock into 100,000 shares of A stock was

never discussed with Seaboard. I had negotiated with other corporations for the sale of Liberty's B stock. (Tr. 214) In 1951 I had negotiations with Family Finance. Mr. Dolliver, President of Family Finance, said they were willing to pay $1,800,000 for the B stock and then merge with Liberty. The arrangement did not contain a reclassification of B shares. (Tr. 215) Mr. Barnes of American Investment Co. talked to me about the same time concerning the purchase of the B stock at a price of $1,700,000. The deal did not go through. They had difficulty with Domestic Finance and called it off. (Tr. 216) It did not involve reclassification of B stock. In November, 1953 Lichtenstein and Costigan discussed with me at American Investment Company the purchase of the B stock for $1,500,000 and the exchange of 5/6 of a share of American for 1 share of Liberty. (Tr. 217) That deal did not go through and did not involve the reclassification of the 7500 B shares. We felt the A stockholders should get 1 share for 1 share. The members of my family who own B stock were my wife (Tr. 218) Virginia K. Levy, my daughter Harriet Levy, my brother Harry H., (Tr. 219) my deceased sister's husband Louis Strilky, my brother's wife Margaret and her son John. (Tr. 220) Under the option agreement of July 8, 1954, I was to receive approximately $271.00 per share for my stock. When we first had the original deal with American, Strilky said he would like to have $300,000 for his stock. (Tr. 221) I did not inform him of the price I was getting for my shares.

I purchased 9 shares of B stock from Fairman & Harris after the option agreement of July 8th (Tr. 223) at $230.00 per share. (Tr. 246) I purchased 43 shares of B stock (Tr. 223) in March and April 1954 at $20.00 or $21.00 per share. (Tr. 246) I still own the common stock that I received in the reclassification for the 43 shares (Tr. 224) and for the 9 shares. As Chairman of the Board of

Directors of Liberty Loan Corporation my duties are many. (Tr. 225) We have lines of credit of over $29,-000,000 with banks. We are borrowing $6,500,000 from insurance companies (Tr. 228) * * * I go around to banks and they ask me questions about our business. I also call on other banks in getting lines of credit. (Tr. 227) I saw Harrington of the Second State Street Trust Company of Boston which increased our line of credit from $800,-000 to $1,000,000. Mr. Woodcock and I had personal conferences with officers of the First National Bank, Main State Bank, Drovers National Bank, National Security Bank, Uptown National Bank, Chicago National Bank, Livestock National Bank, which increased our lines of credit. (Tr. 229) I write to Mr. Lichtenstein from time to time and tell him the banks I have called on.

I first talked to Lichtenstein about my salary about the time the options were signed. (Tr. 230) He wanted to be sure that the top managment would continue on. (Tr. 231) Strilky, H. H. and I were willing to take a reduction in salary to bring these new men in without increasing the overhead.

Since January of 1955 Strilky's duties were supervisory of the industry's operations. He had charge of the entire Illinois operation. He was working closely with Gerard (Tr. 232) who came here with Lichtenstein. My brother H. H. handled the collections. (Tr. 233)

I have a private office at 111 West Jackson (Tr. 234) I am in the office every day from 9:30 to 5:00.

Mr. Costigan was somewhat active in the negotiations between me and Mr. Lichtenstein. He was a stock broker connected with Edward D. Jones & Co. (Tr. 235)

Prior to July 20, 1954 Lichtenstein said he would like to have four of the directors resign so they could be replaced by Mr. Lichtenstein's nominees. (Tr. 236) My brother H. H. Levy, Frederick Deibler, Mr. Strilky and

Mr. Nerad resigned and then Mr. Lichtenstein elected his men to the Board of Directors and then had management control of the Company. (Tr. 237)

D. S. Nerad was secretary and treasurer of the corporation at the time I was in control. Nerad received 1000 shares of stock under the Employees' Stock Purchase Plan. Nerad left Liberty at the end of 1954 or the first part of 1955. (Tr. 238)

Mr. B. Burns had 300 shares under the Employees' Stock Purchase Plan. He is no longer with Liberty.

Ruth Anderson, who was with Liberty, is no longer associated with it. (Tr. 239)

William L. Price, who received 100 shares under the Employees' Stock Purchase Plan, is no longer with Liberty. (Tr. 240)

W. H. Schaffer, who was with Liberty and who participated in the Plan, is no longer with Liberty. (Tr. 241)

At the meeting of July 20, 1954 I discussed some old employees that had been with Liberty for inclusion in the list and Mr. Lichtenstein selected some people who were coming into the corporation for inclusion in the list. (Tr. 242)

F. H. Thayer is still with the Company. (Tr. 244)

Arthur Strilky is the son of Louis Strilky. (Tr. 246)

As far as I know, no contract has been entered into between Liberty and any participant in the Employees' Stock Purchase Plan. (Tr. 249) Mr. Nerad returned his stock which he had purchased under the Employees' Stock Purchase Plan when he left the corporation. (Tr. 250) Mr. Burns still has the shares of stock he has acquired. Ruth Anderson still has her shares. The corporation has not entered into any contract of employment with David B. Lichtenstein. (Tr. 251) As of July 19, 1954 David B. Lichtenstein was not employed by any other concern. Salary for David B. Lichtenstein for the year 1955 has not been set. (Tr. 252)

On March 1, 1955 I was paid in full for the shares of stock I sold to Mr. Lichtenstein. (Tr. 255)

A few days before July 8, 1954 Lichtenstein informed Mr. Maland that they were forming Key Finance Corporation. Prior to July 8, 1954 I had only one conversation with Mr. Lichtenstein about the sale of my interest. (Tr. 256) In the early part of March, at Mr. Lichtenstein's home, with Mr. Costigan, there was a discussion on it and Mr. Lichtenstein said he could not enter into any kind of agreement as long as he was in the employ of American. (Tr. 259) I was living in Chicago at that time. I had no discussion with Mr. Lichtenstein in April of 1954. (Tr. 260) I had no telephone discussion with Mr. Lichtenstein about the sale of B shares before May 26, 1954.

On May 27, 1954 Mr. Maland advised me not to be a party to the reclassification of 7500 shares to 100,000 shares. Subsequent to that date, as Chairman of the Board of Directors, I voted to approve the reclassification of shares. At the meeting of November 3, 1954 I was one of the proxies designated by the stockholders for most of the shares of stock which were voted at that meeting. I was present at the meeting. (Tr. 261) Those proxies were all voted in favor of the merger and reclassification of shares, except those that indicated on the proxies that they wanted to vote against the merger and reclassification. Those proxies that were not designated one way or the other I voted in favor of the reclassification and merger as instructed. (Tr. 262) I voted my own 4945 Class A shares in favor of the reclassification and merger. I don't know whether voting for the merger was voting in favor of the reclassification of shares or not. (Tr. 264)

My wife Virginia voted 3039 Class A shares in favor of the merger by proxy. (Tr. 265)

The signature of "I. H. Levy" on plaintiff's Exhibit 24 was placed on the letter of September 21, 1954 with my authorization. I did not discuss the notice for the meeting of November 3, 1954 on the first page of plaintiff's Exhibit 3 with anyone (Tr. 266) and had nothing to do with sending it out (Tr. 267) or its preparation. (Tr. 268)

Four members of the Board of Directors who resigned July 20, 1954 were representing A stockholders and B stockholders. (Tr. 270) In my various dealings in connection with the sale of stock held by me and my family I did not deal with anyone except David B. Lichtenstein. Mr. Lichtenstein never dealt directly with any members of my family, but always dealt through me. (Tr. 271)

During the six-month period ending in June, 1956 the earnings will be in excess of $100,000 per month. (Tr. 273) The corporation moved its principal office from Chicago to St. Louis in the latter part of October, 1954. I continued to live in Chicago. (Tr. 274) Mr. David Lichtenstein's brother, Philip Lichtenstein, is President of the American National Bank of St. Louis. A lot of bankers know Mr. David Lichtenstein. He enjoys a fine reputation. (Tr. 275) I organized Liberty Loan Corporation. Central States Finance Corporation, a corporation which I controlled, received the class B shares of Liberty. (Tr. 276) Liberty Loan Corporation received $75,000 or $10 per share for the Class B stock when it was originally issued. (Tr. 277) Since Liberty was organized in 1932 it acquired 66 offices up until the time I resigned as President. None of those offices was acquired by means of a merger. One Michigan office was acquired in an exchange of stock. (Tr. 278) Neither H. H. Levy nor Mr. Louis Strilky moved to Missouri when Liberty moved its office. (Tr. 283) * * *

Cross Examination by Mr. Strachan. (Tr. 288)

Stock held by me and members of my family was voted in favor of the merger at the November 3, 1954 meeting. (Tr. 288) I was in favor of the reclassification of B stock into A stock as part of the merger. Central States Finance Co. was organized in June of 1923. Liberty was organized as its subsidary in 1932. Central States Finance Co. was dissolved in 1939 or 40 (Tr. 289) and I received the B stock of Liberty as part of that liquidation. My wife and I controlled Liberty from that time down to the sale of the B stock to Key. In the proposed merger with Seaboard the B shares of Liberty were to get 60,000 shares of $15 par Convertible Preferred stock which within one year could be converted into Seaboard common, (Tr. 290) share for share. At that time the market price of Seaboard common was $26 a share. (Tr. 291) The B stockholders of Liberty would have received common worth a little over 1½ million dollars in a non-taxable transaction. The Liberty A stockholders would have received 85/100 of a share for each share of A which at the then market would have been an equivalent of abont $22.10 a share. (Tr. 292)

Mr. Strilky continued to perform his usual duties as an employee of Liberty (Tr. 293) until he had another heart attack in April of 1955. H. H. Levy continued to perform his usual duties until his health failed in July of 1955.

Mr. Costigan and his family has several thousand shares of Class A stock. (Tr. 294)

Edward D. Jones & Co., between 1945 and 1952, distributed among its customers substantial blocks of Liberty Loan Convertible Preferred. In the transaction with Key there was no condition, restriction or commitment attached to the sale of B stock. (Tr. 296)

Cross Examination by Mr. McNally. (Tr. 296)

I knew, in voting as a Class A stockholder for the merger at the stockholders' meeting of November 3, 1954, that I was voting for reclassification of the B stock on the basis of 100,000 shares of new common. At that time I had approximately 15,000 shares of A. (Tr. 297)

OSWALD MALAND, called as a witness on behalf of the plaintiff, being first duly sworn was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 298)

My name is Oswald Maland. I live in Evanston. I am an attorney associated with the firm of Chapman & Cutler. I represent I. H. Levy in connection with the sale of his stock to the Key Finance Co. (Tr. 298) I recall a meeting in my office in May, 1954, at which Mr. Harris, Mr. Lichtenstein, Mr. Levy and I were present. At that meeting a proposal was made by Lichtenstein and his group to purchase part of the Class B Common of Liberty. I advised Mr. Levy that we had a deal pending to merge with Seaboard which I thought was legally sound, and I recommended that he not sell any part of his stock unless he sold it all. (Tr. 299) I stated that I thought there was a difference between recapitalization under the Delaware laws and a merger, and that under a merger proceeding, if a Class A stockholder objected, he could get a cash compensation for the fair value of his stock, whereas that was not true under the recapitalization as proposed. At that meeting there was no discussion of a merger with Metropolitan Loan and Investment Co. and Metro Finance Co. or any other company. (Tr. 300) There was a general discussion of the hazards of objections from the Class A stockholders in recapitalization.

Under the Delaware laws, if the vote favors a reclassification, a stockholder who does not wish to participate is required to take what the reclassification plan provides. I pointed out that that was not true under the merger statutes, that I thought the merger procedure was much fairer to a Class A Common stockholder and sounder from a legal standpoint. (Tr. 301)

Cross Examination by Mr. McNally.

I had been representing Liberty prior to this May 1954 meeting, ever since its organization. (Tr. 302) In the Seaboard deal Mr. Levy was to receive convertible preferred. It is my recollection that he was getting a million and a half and that it would be non-taxable. (Tr. 305)

Redirect Examination by Mr. Stevens. (Tr. 306)

Our firm did not assist in the preparation of the proxy statement and notice to stockholders for the November 3, 1954 meeting.

MINNIE KRANTMAN, plaintiff, called as a witness on her own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 308)

My name is Minnie Krantman. I live at 235 Windsor Drive, Waterloo, Iowa. I quite often stay with my daughter Dina who lives at 101 Martin Road, Waterloo, Iowa. My husband Joseph is deceased (Tr. 309). Mr. Louis Shulman handled my husband's estate. My daughter's married name is Shulman. Her husband's first name is Herbert. Mr. Herbert Shulman is Mr. Louis Shulman's brother. That is my daughter's signature on Plaintiff's Ex. 35-C for identification. (Tr. 310) I have my bank account at Marshalltown, Iowa, in the Fidelity Bank. No

one's funds are in that bank account other than mine. My daughter does the business for me. She signed this check. (Tr. 311) She was authorized by me to sign checks from my personal account. The purpose of the check was to buy stock in Liberty Loan and a few others. I think that plaintiff's Exhibits 35-A and 35-B are the other stocks that check 35-C was in payment of. (Tr. 312) I talked to Mr. Shulman about bringing a lawsuit against Liberty Loan Corporation a couple of weeks after this check was cleared. (Tr. 313)

Cross Examination by Mr. McNally. (Tr. 313)

Mr. Louis Shulman's office is on Fourth Street (Tr. 313) Iowa City, Iowa. I have never been in his office. Harry Shulman is Louis Shulman's father. Harry Shulman is retired. (Tr. 314) Louis Shulman never talked about American Investment Company (Tr. 315) Mr. Shulman and I read the Complaint filed by me together. He explained what it was. I don't recall when. (Tr. 316) I recall my deposition being taken April 27, 1956 (Tr. 317) I don't remember what I said at that deposition. I signed the Complaint; I don't remember the date (Tr. 320), before it was filed. Mr. Shulman and my daughter, I think, were present when I read it over in my daughter's home in Waterloo. (Tr. 321) I don't remember whether I signed an affidavit that the allegations were true after the filing of the Complaint. (Tr. 322) I think I signed something after the suit was filed. Waterloo is in Blackhawk County. (Tr. 323) I don't know anything about the stock purchase plan or the reclassification of B stock, (Tr. 324) but I know there was a swindle and that I am here to protect the stockholders. I don't know if I ever knew anything about the reclassification of Class B shares. I don't know anything about compensation to Mr. I. H. Levy and his brother and Strilky. (Tr. 325) I never knew

about it. I read some of Plaintiff's Ex. 3 and my daughter explained what it meant. (Tr. 326) I don't remember when I and my daughter discussed Plaintiff's Ex. 3. My daughter got it through the mail. (Tr. 327) I discussed it with Mr. Shulman. He told me somebody wanted to get rich on the stockholders. (Tr. 328) The only thing I know is that it is a swindle. That's enough for me to know. (Tr. 329) I don't know of anything that wasn't disclosed in Plaintiff's Exhibit 3. I trust Mr. Shulman everything. He took care of everything since my husband passed away. My husband died in 1953. At that time I asked Mr. Shulman to invest some money for me in stocks. (Tr. 330) The next time I heard anything about making stock purchases was on September 16, 1954. I told him he should buy something that I should get a little income. That is all. (Tr. 331) When Mr. Louis Shulman told me on September 16, 1954 that he bought 25 shares of Liberty he did not at that time tell me that there was a swindle in connection with it. I don't remember the answer I gave on my deposition April 27, 1956. (Tr. 333) Mr. Shulman discussed the letter of September 1, 1954 from Quail & Co., brokers, to Louis Shulman after the suit was filed. (Tr. 339) I read a little. My daughter showed me the letter dated November 5, 1954 and I talked it over with her. (Tr. 340) Mr. Shulman told me that I could have the value of my shares fixed and get paid the cash amount for them. I did not want to sell. I bought it just because I wanted a little income. I did not buy it to sell and make money on it. I just wanted something to bring in a little money for expenses. No matter how much the stock might pay me I was not interested in that. (Tr. 341) All papers were signed in my daughter's home. (Tr. 342) That is my signature on the Amendment to Complaint and Supplemental Complaint. It was signed in my daughter's

home. I don't think any one was there other than my daughter. (Tr. 343) I don't remember if I raised my hand and swore when I signed it. (Tr. 345) I know that defendants' Exhibits 3 to 8 are my dividend checks. I cashed those checks personally. I bought groceries with the money. (Tr. 346) I never talked to any other stockholders of Liberty. (Tr. 347)

DAVID B. LICHTENSTEIN, called as a witness at the instance of the plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stevens. (Tr. 348)

My name is David B. Lichtenstein. I live in LaDue, Missouri, a suburb of St. Louis, Missouri. I am president of Liberty Loan Corporation. I first discussed the stock option plan with Mr. Levy before the May 27 meeting. It could have been in April of 1954. The first time the present form of the Employees' Stock Purchase Plan was discussed was when Mr. Dallstream suggested it (Tr. 350) in July of 1954. I heard Mr. Levy testify that he named some of the persons on the list of participants in the Employees' Stock Purchase Plan. I believe I named the balance of the persons on the list. (Tr. 351) I am not sure whether the list which is included in Plaintiff's Exhibit 8 was typed before the meeting of July 20, 1954. (Tr. 352) There was some talk about whether I. H. Levy or H. H. Levy or Mr. Strilky should participate in the stock purchase plan and the directors decided that they should not. (Tr. 353) My name on the list to the extent of 33,000 shares was included at my suggestion. My name as trustee for David B. Lichtenstein, Jr. for 11,500 shares was upon my written designation. David B. Lichtenstein is my son. The name "David B. Lichtenstein, trustee for Daniel B. Lichtenstein" for 11,500 shares

was upon my designation. (Tr. 354) The name of Mercedes D. Lichtenstein for 12,000 shares was included at my suggestion. She is my wife. In 1937 I, with my wife, gave 700 shares each of American Investment Company to these two trusts. The stock was worth six or seven thousand dollars at that time and all the increase has been made out of the trust. My wife has not worked for the last ten years. We have been married for thirty-some years. (Tr. 355) All of the money that she has made was by her own investments.

I have no contract of employment with Liberty. I don't believe in contracts of employment. They are only one-sided for the man who is going to be employed. There were no contracts in my business history except for those who were selling out and you wanted a non-compete. None of the other participants in the Employees' Stock Purchase Plan has entered into any contract of employment with Liberty. (Tr. 356) Some of the people who participated in the Employees' Stock Purchase Plan have left the employment of Liberty. There are 1300 shares that have been retained by employees who left. Miss Anderson retained 300 shares. (Tr. 357) Ruth Anderson, P. J. Dunne, William L. Price and W. K. Schaffer all left the employment of Liberty Loan and still have their shares. They had worked a great many years and were entitled to retain them. I left my employment with American Investment Company on May 24, 1954. I was Executive Vice President of the Company and its subsidiaries and the operating head of the Company. Donald Barnes was president of the Company. (Tr. 359) I am an attorney, not admitted in Illinois, but in the State of Missouri. I have not engaged in the actual practice of law except for Liberty. We have organized 100 subsidiaries and I have done that. I have taken care of the purchases that we have made, and I do the contracts in

connection with them. Key Finance Company was organized by my son. I did telephone C. T. Corporation and asked them to do it. (Tr. 360) I am not a stockholder in Key Finance Company. I am not on the Board of Directors or an officer. I have been present at some of the meetings Key Finance Company has held since its organization. I was present at the stockholders' meeting when they considered the proxy statement of Liberty. (Tr. 361) The Daniel B. Lichtenstein who owns 500 shares of stock in the Key Finance Company is my son. David B. Lichtenstein, Jr. who owns 542 shares is my other son. Mercedes D. Lichtenstein who owns 711 shares of Key is my wife.

Philip F. Lichtenstein who has 449 shares, is my brother. In all three cases it was their own money that was used to purchase the shares. (Tr. 362) June Pauline Cole, who has 31 shares, is my secretary. Lyle S. Woodcock, who has 357 shares, is one of the directors and Vice President of Liberty Loan Corporation. (Tr. 363) Anthony A. Buford, who owns 203 shares, is a director of Liberty. He is general attorney for Anheuser Busch. I talked to him about coming into Liberty and investing in the purchase of B shares of Liberty. I did not talk to August A. Busch, Jr. before he became a stockholder of 52 shares of Key, but Mr. Buford did. (Tr. 364) I talked to A. G. Clodius who owns 203 shares in Key, before he invested. Gratiot Equipment Company, which has 77 shares, is owned by George Herbst with whom I talked before his investment.

Dorothy H. Russell for 19 shares, Dorothy Herbst Russell for 19 shares and Dorothy Russell for 19 shares are all relatives of Mr. Herbst. (Tr. 365) I talked to Mr. John L. Wilson who has 52 shares of Key, before he invested in Key. Mary Frances Wilson who has 52 shares is John Wilson's wife. Key Finance Company

has not engaged in any business other than the purchase of shares of stock in Liberty Loan Corporation. (Tr. 366)

Before the notice of special meeting of stockholders for November 3, 1954, and the proxy statement accompanying it, were sent out, I went over them in some detail. (Tr. 368) I did not have any discussion with any one in connection with the fact that there was no mention in the notice of the reclassification of 7500 shares of Class B and 100,000 shares of Common. (Tr. 369) * * *

I dispute the fact that as a result of this merger the 7500 shares of B shares are increased in equity from $125,000 to nearly $1,400,000, based on the figures in the proxy statement, because nobody has the right to divide up the Company. (Tr. 376) One share of B stock before the merger had an equity of about $16.70. (Tr. 377) I dispute that the book value of 13⅓ shares exchanged for 1 B share would be about $188.00, because I don't think you can divide it. (Tr. 378) Key Finance Company signed a regular proxy form designating me, I. H. Levy and John Wilson as the proxies for the November 3, 1954 meeting. Mr. Levy, Mr. Wilson and I were present at that meeting. I acted as Chairman. Mr. Stevens was present at that meeting (Tr. 382) and mentioned that Krantman *v.* Liberty Loan Corporation was pending in the U. S. District Court.

I first discussed the possible merger between Liberty Loan Corporation and Metro Finance Company and Metropolitan Loan and Investment Company with some representative of those two companies about July 11, 1954, after the signing of the options of July 8, 1954. (Tr. 384) On July 20, 1954, at the Board of Directors meeting, I discussed my discussions with the Metro and Metropolitan people. At that Board meeting the number of shares which Metro and Metropolitan ultimately received was mentioned by me. (Tr. 385) I have no recollection

of discussing the reclassification of the B stock into a larger number of A shares earlier than June, 1954. Levy had tried to obtain executives for a number of years and had been able to get only men who were not able to accomplish much. I knew that unless executives could secure stock interest in it, which they cannot if it (Tr. 386) is controlled by one man, it would not mean anything to them over their life time. (Tr. 387) The B stockholders would never agree to eliminate the control by converting the B shares directly into A shares, share for share, although it could have been legally possible. (Tr. 388) The B stock could sell the assets. (Tr. 389) Compensation was paid to securities brokers to obtain favorable proxies of the Class A shareholders for the November 3, 1954 meeting. Compensation was paid after November 3, 1954. (Tr. 390)

Plaintiff's Exhibit 29 in evidence is the record of money paid to dealers on 173,091 shares of Common Class A stock for favorable votes. They were paid at the rate of 15¢ per share for favorable votes on the merger and Employees' Stock Purchase Plan. No dealers were paid for soliciting any votes that were opposed to the merger or to reclassification of stock or to the Employees' Stock Purchase Plan. (Tr. 391)

I first discussed the possibility of paying securities men for the solicitation of proxies in connection with the reclassification of stock in August, 1954.

The only thing I can recall ever saying to Costigan was that in the Ohio Finance deal, which occurred some five years previous, the dealers were paid for their work in soliciting, and that I presume the setup would have to be similar to what was done in Ohio Finance. (Tr. 394) This is a common practice.

Generally speaking, I never favored contracts of employment of a corporation, except where you can get

a non-compete agreement to protect the corporation. I was with one corporation nearly 28 years and no executive ever (Tr. 396) had one. My general policy was deviated from in connection with H. H. Levy and Louis Strilky because I could assure myself that they would not go in business and compete. (Tr. 396) I would say that during my period of association with American Investment Company the policies of American Investment Company were decided more by myself than by Mr. Barnes, except when it came to bank lines. Mr. Barnes always controlled the Board of Directors. He had the company before I came into it. (Tr. 397) Mr. Barnes and his family had about 20% of the common stock of American. (Tr. 398)

Prior to November 26, 1954, the President of Liberty operated as Chairman of the Board. (Tr. 399)

The difference between the 93,600 partially paid and assessable shares outstanding December 31, 1954, and the 87,762 partially paid and assessable shares outstanding as of December 31, 1955, shown in plaintiff's Exhibit 32, is the number of shares actually issued pursuant to the Employees' Stock Purchase Plan, on which $17.00 per share had been paid in full.

I recognize that prior to November 3, 1954 the Class B Shareholders had equal rights on liquidation to the Class A Shareholders, share for share. (Tr. 400) * * * I don't think that the book value or liquidation rights of the 100,000 new shares issued in exchange for the 7500 Class B stock would be $1,416,513. (Tr. 405) The restriction on the 100,000 shares would affect their market value. (Tr. 407) I think the figures would be correct if there were a liquidation, but we did not go into the company to liquidate it. (Tr. 409) I did not think it appropriate to mention the $1,416,000. (Tr. 410) Nowhere in the entire 65-page proxy statement is it shown that the value upon

liquidation of the 100,000 shares exchanged for the Class B shares would be approximately $1,400,000. I think it would be poor accounting to show it. (Tr. 411) There is also a change in the book value or liquidation value in the former Class A shares of stock as a result of this merger and reclassification. (Tr. 413) Before the merger the book value of the 449,606 shares of Class A would be $7,512,-016.26. After the merger there were 472,805 shares outstanding, not including the employees' stock, with a value of $6,699,661.02. (Tr. 419) The figure of 472,805 shares of stock included the shares of stock issued to Metro and Metropolitan (Tr. 422), so I could not take two comparable figures but I took the $7,500,000 figure and compared it to the $6,699,000 figure. (Tr. 423)

"Mr. Stevens: The control of the corporation is still in the hands of Mr. Lichtenstein. He testified that—

Mr. McNally: He has working control." (Tr. 425)

It is correct, as stated on page 9 of the proxy statement, that the basis of exchange of the Common stock of the surviving corporation for the capital stocks of the Metro and Metropolitan was determined largely by the respective book value and per share earnings of such stocks. (Tr. 426) The book value of the corporation is a factor if there is going to be a merger between one corporation and another. In the small loan business mergers or acquisitions occur with some degree of regularity. (Tr. 427) * * *

No agreement not to compete in the event I left Liberty was ever executed by me. I have received no pay from the Company. I will draw no pay for 1954. The Board of Directors can go back to any date but not before January 1, 1955. (Tr. 437)

Key Finance still owns the shares of stock it received in the reclassification. (Tr. 438) The shareholders of Key Finance Company are as follows:

Anthony A. Buford, 203 shares
August A. Busch, Jr., 52 shares
A. G. Clodius, 203 shares
June Pauline Cole, 31 shares
Alfred Fleishman, 22 shares
William A. Gerard, 357 shares
Gratiot Equipment Company, 77 shares
Daniel B. Lichtenstein, 500 shares
David B. Lichtenstein, Jr., 542 shares
Mercedes D. Lichtenstein, 711 shares
Philip F. Lichtenstein, 449 shares
Dorothy H. Russell, 19 shares
Dorothy Herbst Russell, 19 shares
Dorothy Russell, 19 shares
John L. Wilson, 52 shares
Mary Frances Wilson, 52 shares
Lyle S. Woodcock, 357 shares (Tr. 440)

Cross Examination by Mr. McNally. (Tr. 441)

The employees who have left the employ of Liberty were all old employees. We doubt whether Liberty could have sold the stock for $17.00 per share after paying commissions, because they had sold preferred stock for less and the company was not in as good a condition as when it sold the preferred. The price to the employees under the stock purchase plan was the approximate market value. (Tr. 442) The stock issued under the Employees' Stock Purchase Plan was restricted. The purchasers couldn't accelerate payments unless 90¢ per share was earned on all stock outstanding for a six-month period, and then the Board of Directors could accelerate the purchase. (Tr. 443) Dividends were paid on the proportionate amounts the purchasers had paid in. The purchasers could not sell the stock for thirty days after it was fully paid for. (Tr. 444)

None of the employees I brought in when I took over the management, who were under the stock purchase plan, have left Liberty. (Tr. 446) Every employee under the plan was given the right to designate other members of his family or family trust to take part of the shares. A number of corporations have such provisions for employees. (Tr. 447) If I sold my American Investment stock and paid my capital gain, I would have enough money to buy 68,000 shares under the stock purchase plan.

There were no agreements about the amount of my salary. If the Board of Directors should ask for a suggestion I hope that I will get the same as my basic salary with American Investment Company, of $72,000 a year. (Tr. 448) Mr. Levy's salary was $60,000 per year and that was reduced to $40,000 when we came in. (Tr. 449)

* * *

On July 20, 1954, a release was sent out by Mr. Levy to all the newspapers, stating that new management had come in and we intended to eliminate the B stock and that there would be approximately 650,000 shares outstanding after the B stock had been eliminated through a merger with some other company. This information was sent to Moody's, Standard & Poor, Wall Street Journal and Dow-Jones. Statements in those publications said that the 7500 shares of Class B Common stock of Liberty would be reclassified into 100,000 shares of new Common. (Tr. 451) On September 11th Moody's had the complete story, including the 100,000 shares of reclassification of the new Common for the 7500 shares of Class B. This was in Standard & Poor's on September 13, 1954. (Tr. 452) * * *

Starting July 20, 1954, we opened additional offices and put in a training program. On November 3, 1954, we had 79 offices. Thereafter, we gradually opened offices, moved and remodeled them. We instituted the purchase of sales

finance paper in about 100 offices on appliances and household goods. (Tr. 456) We now have 127 offices open. We have increased our bank lines from about $20 million to $29 million. We are negotiating with insurance companies for 8½ million dollars worth of senior notes. (Tr. 457) The insurance companies have about three times as much money as the common stockholders have in the business. They knew about the plan and merger. (Tr. 458) They get our audit reports. This plan was discussed with the insurance company that held our notes at that time and with all the major banks. None of them said we were committing a swindle and fraud, but complimented us. (Tr. 459) The banking institutions would not be interested in this company if anybody in it was committing a fraud. The accounts receivables increased from July 20, 1954 from about $20 million to $36,500,000 to date. According to Federal Reserve figures, from June, 1954 to March, 1956, industry has gone up 26% and we have gone up 67%. We have increased our number of accounts 71% and our outstandings 75%. (Tr. 460) Prior to July 20, 1954, Liberty was approximately thirtieth in the small loans industry. Now it is eighth or ninth in the number of offices, and maybe tenth as to accounts receivables. The market value is a little better than $32 (Tr. 461) at the present time for Common stock. The stock has done better market-value-wise than other companies. The stock is selling on about a 4.6% dividend basis, whereas most of the finance company stocks sell at around 5½% or 6%. (Tr. 462) There have been minor increases in other small loan companies market prices since July, 1954, but none that have come near the increase in Liberty. (Tr. 463)

Cross Examination by Mr. Strachan. (Tr. 464)

I participated in the negotiations between Levy and American Investment Company in 1950 and 1951. There

was not any discussion of the price per share, but American Investment Company was willing to pay $1,700,000 for the stock. (Tr. 465) In 1953 the price of $1,500,000 was under discussion for the sale of the Class B stock. The price was not acceptable to Mr. Levy.

There was no agreement that I. H. Levy, H. H. Levy and Louis Strilky were to be paid salaries as part of the purchase price of the B stock. (Tr. 466) There was no agreement that salaries were to be paid without substantial services being rendered to the corporation. Mr. Levy has done more than he testified to. He has negotiated three substantial purchases of accounts receivables. (Tr. 467) Last month he sold one-half million dollars worth of 12-year notes to an insurance company in Chicago. He has gone to banks in Chicago, Boston, New York, Philadelphia, Detroit and Cleveland and secured additional lines of credit. H. H. Levy, when he came into the company, had a department of eight employees handling collections. (Tr. 468) Later I gave him extra duties with respect to instructing men on collections. The duties I assigned to Mr. H. H. Levy were performed by him until his contract was terminated. (Tr. 469) His work was in Chicago where we have about 18 offices.

Mr. Strilky's work was to take care of a major portion of Illinois. He had a number of supervisors under him. He had a heart attack and was gone about a month (Tr. 470) and we agreed to a modification of his contract, under which he received 60% of the remainder due him, and he agreed not to compete with the company. His duties could be performed in Chicago. (Tr. 471)

We had no agreement as to the reclassification of the B stock into common stock in connection with the purchase by Key Finance. The sale was not subject to any condition whatsoever.

There are offices of Liberty in fifteen states. (Tr. 473)

Redirect Examination by Mr. Stevens. (Tr. 474)

When 1 share of employees stock is purchased for the payment of $1.00 out of $17.00, that share of stock has equal voting rights with every other share of common stock. The earnings per share on common stock in 1953 was $1.99. They are now earning on the basis of $2.19 per share as of May 31st. (Tr. 475) The Board of Directors could authorize an acceleration of the purchase of employees stock purchase shares under the current earnings. (Tr. 476)

My compensation with American Investment Company was more than the base salary. I was regularly granted a 15% bonus in a profit-sharing plan and a 15% cash bonus if the earnings justified it. As to my knowledge of market prices, it does not include such loan companies as Commercial Credit and C.I.T. Finance Corporation, which are not in my field. (Tr. 477) Seaboard Finance is partly in our field. I don't know the market prices of Seaboard Finance from 1954 to the present time. (Tr. 478) I think Beneficial has gone up about a dollar and Household has gone up and went down. American had a slight increase, but not a whole lot. Those are the three leading companies. (Tr. 479)

The deposition of EDWARD J. COSTIGAN, called as a witness at the instance of the plaintiff, pursuant to Rule 43(b) was read in evidence,

Direct Examination by Mr. Stevens. (Tr. 488)

My name is Edward J. Costigan. I live in St. Louis, Missouri. My occupation is investment banking with Edward D. Jones & Co. of St. Louis. I am presently a director of Liberty Loan Company. Edward D. Jones & Co. represents a substantial number of stockholders of Liberty more now than in 1954. (Tr. 489) I suppose some

of the Class A stockholders of Liberty relied upon Edward D. Jones & Co. for advice, and Edward D. Jones & Co. gave advice in connection with the merger of November 3, 1954 to Class A stockholders. (Tr. 490) It consistently gave advice in favor of the merger. (Tr. 49) $22,500 was paid in three securities concerns, including Edward D. Jones & Co., in connection with the Liberty merger. About $7500 of that amount went to Edward D. Jones & Co. in addition to the amount that was paid it for the actual solicitation of the proxies. (Tr. 492) For this Edward D. Jones & Co., worked hard in providing new management for Liberty in Lichtenstein, whom we consider the outstanding man in the small loan field. It also helped to restore voting power to the common stockholder and in the exchange of Class B stock for Common. (Tr. 493) It helped to provide information to stockholders so they could vote for or against the merger. (Tr. 494) Some salesmen could have presented the information in the proxy statement so that the stockholders would understand what was in the proxy statement. (Tr. 495) The average stockholder may or may not have understood clearly what the transaction was, simply by having the proxy statement sent to him. (Tr. 496) Some customers need to be guided, some don't. (Tr. 497) There has been no promise of additional compensation to Edward D. Jones & Co. (Tr. 498) * * * The $7500 to Edward D. Jones & Co. was decided on in September, 1954, as to the amount (Tr. 501)

There was one meeting with Mr. Lichtenstein and Mr. Levy in St. Louis in November, 1953, at the office of American Investment. (Tr. 502) Mr. Lichtenstein was then acting on behalf of American Investment as Executive Vice-President and Director. Mr. Levy wanted $1,800,000 for his 7241 B shares. Mr. Levy had hoped he could get two million for the stock. (Tr. 503) There were

other companies interested in Liberty over the years. Mr. Levy had negotiations with Seaboard Finance Company during 1954. The sales price of the B shares to Lichtenstein's group was $1,700,000. (Tr. 504) The first part of July, 1954, in a telephone conversation between myself and Mr. Lichtenstein, there was a very general conversation about salary for I. H. Levy, Mr. Strilky and H. H. Levy. (Tr. 505-510.)

I met with Mr. Lichtenstein and Mr. Levy in April, 1954 at Mr. Lichtenstein's home. (Tr. 511) There was a discussion of the sale of half of Mr. Levy's shares to Mr. Lichtenstein. (Tr. 511-514) There was a discussion of the requirement that the B shares be reclassified into 100,000 Common shares. (Tr. 514-515) There was some discussion of stock options to Mr. Lichtenstein. (Tr. 515-516) I met with Mr. Harris and Mr. Lichtenstein at the University Club before luncheon in the first week in May, 1954. (Tr. 518) I don't remember any discussion of a merger. (Tr. 521) Following the luncheon meeting, Mr. Oswald Maland, Mr. Lichtenstein, Mr. Harris, Mr. Levy and I met in Mr. Maland's office. Mr. Maland was representing Mr. Levy. Mr. Maland wanted Mr. Levy to sell all his B shares rather than half. (Tr. 522) What Mr. Maland wanted more than anything else was a merger with Seaboard. (Tr. 526) It is true, as I testified, before Judge Harper in court in St. Louis in April, 1955, that Mr. Maland was fearful that I. H. Levy would be subject to criticism by the A stockholders and he preferred him to get out completely rather than half. He was afraid of the Class A stockholders because a recapitalization would be required. The risk of recapitalization would have to be borne by the buyer rather than the seller. (Tr. 528-532)

On the train home to St. Louis I had a conversation with Lichtenstein about purchasing all the Class B shares

owned by Mr. Levy and his family and I offered to put some money into the transaction myself. (Tr. 532)

About May 26, 1954, Mr. Nix of Riter & Co., Mr. Harris of Fairman & Harris, Mr. Levy, Mr. Lichtenstein and I met at the Chicago Club. (Tr. 536) Mr. Nix was against the reclassification of 7500 B shares into 100,000 Common. (Tr. 537) Mr. Nix was opposed to Mr. Lichtenstein coming into the picture because it would have interfered with his Seaboard Finance deal. Mr. Nix was trading on the idea that 100,000 shares was too much. He used some figures like 50,000 or 75,000 shares as enough. (Tr. 539) In March, Mr. Lichtenstein and I had a meeting in his home. (Tr. 541) He said that there might be some compensation to dealers for soliciting proxies. (Tr. 542) I think I told this to Mr. Harris and Mr. Nix. I mentioned it to Mr. Nix in New York in March in the presence of Mr. Levy at the office of Riter & Co. (Tr. 542) It could have been at our first meeting in March, 1954, between Mr. Lichtenstein and me that Mr. Lichtenstein said it was necessary to reclassify the B stock in order to put the voting power into the hands of the A stockholders and to provide management, and that he would not have put up $1,700,000 to come into the Company without the idea of reclassification. (Tr. 544) At the Chicago Club in the latter part of May, 1954, I told Mr. Nix that in order to provide outstanding management, Lichtenstein would not come in unless this B stock were out of the way and the voting power was in the hands of the Class A stockholders; that you would never attract good management into the Company with the capitalization the way it existed, so that in order to have Mr. Lichtenstein pay $1,700,000 and come out, you had to have 100,000 shares which was about the market value of the other stock. (Tr. 546) Mr. Harris was lukewarm to the reclassification of 7500 shares to 100,000 shares at the meeting at the Chi-

cago Club. He was in hopes that there might be a lower figure than 100,000 shares. (Tr. 548) Allen J. Nix was a Director of Liberty before July 20, 1954. (Tr. 549) He was re-elected at the next annual meeting and is a Director now. I was a spectator at the Board meeting of July 20, 1954, and elected a Director on November 3, 1954. (Tr. 551) * * *

Cross Examination by Mr. McNally. (Tr. 555)

My wife and I owned Class A stock years prior to July of 1954. Jones & Co. had sold 25,000 shares of Liberty to customers. (Tr. 556) My interest in getting in the picture was primarily to provide management for Liberty, which I thought was sorely needed. Lichtenstein in the early part of 1954 was on leave of absence from American Investment Company. I did everything I could to try to get him into the management of Liberty because I consider him the outstanding man in the industry. My opinion of Lichtenstein is supported by others interested in the small loan industry. (Tr. 557) Investment men and commercial bankers in the St. Louis area highly regarded and respected David Lichtenstein. (Tr. 558) I am referring to his outstanding managerial ability, establishing training programs, opening new offices. Our brokerage concerns are selling substantially more Liberty stock than before—possibly 75,000 shares are in the hands of our customers. (Tr. 560)

Cross Examination by Mr. Strachan. (Tr. 561)

Our family has increased its holding in Liberty common since the merger. Mr. I. H. Levy has continued to be active in the Company's business. He calls on various commercial bankers who loan him money; he attends conventions, (Tr. 561) keeps up his contacts. He is watchful for

any business deal that Liberty might make in the acquisition of another finance company. He is a valuable man for Liberty. He has been elected and re-elected Chairman of the Board. The effect of the announcement of Mr. Lichtenstein's joining the organization had a strong upward effect on the market of Class A stock. (Tr. 562) The reclassification did not adversely affect the market price of the stock. (Tr. 563)

Redirect Examination by Mr. Stevens (Tr. 564)

Prior to the merger meeting of November 3, 1954 I and my relatives owned about 4,000 shares which were voted in favor of the merger. There were some stockholders of Class A stock for whose vote brokers did not receive 15¢ per share. (Tr. 566) Before Mr. Lichtenstein came into Liberty the receivables were going off a little. (Tr. 568) The Company was not showing the growth that we wanted. In this period I. H. Levy was in effect the management of the Company. (Tr. 569) Our organization was not deep enough. Mr. Louis Strilky and H. H. Levy were members of management that conducted Liberty up to the time that Mr. Lichtenstein was managing head. (Tr. 570)

Edward D. Jones & Co. has been recommending the purchase of Liberty Loan stock to its customers. (Tr. 572) Lichtenstein's coming into the Company was in the press July 20th and in Dodge Service and Moody's Manual, Standard & Poor certainly in August. (Tr. 573) The reclassification was in Moody's by the middle of August. (Tr. 574) In three or four cases other offices were acquired by Liberty by some method other than the merger since November 1, 1954. (Tr. 578)

Recross Examination by Mr. McNally. (Tr. 578)

I favored the plan including the merger, the reclassification of stock and the Employees' Stock Purchase Plan right from the beginning because we wanted to provide management for Liberty and Lichtenstein was an able man and we thought it would be a great thing for the Class A stockholders. Compensation was very secondary. (Tr. 579) I felt a loyalty to quite a few customers of mine who owned Class A stock in Liberty.

Recross Examination by Mr. Strachan. (Tr. 580)

Up until the first part of September I didn't know what, if any amount I would receive as compensation. I thought by having Lichtenstein in with the personnel that he would have, there would be a chance for terrific growth, whereas if Liberty went into Seaboard, it would be getting into a mature company. (Tr. 581)

172

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 54 C 1537) * *

DECREE.

This cause having come on for trial and the Court having heard the evidence presented by the Plaintiff on the issues in the case, and the Plaintiff having completed the presentation of her evidence and rested, and the Defendants and each of them, without having waived their right to offer evidence in the event their motion be not granted, having moved for a dismissal on the ground that upon the facts and the law the Plaintiff has shown no right to relief; and the Court having heard the arguments of counsel and being fully advised in the premises;

173 It Is Hereby Ordered, Adjudged and Decreed that:

1. This action be and it is hereby dismissed upon the merits for want of equity at Plaintiff's costs;

2. Jurisdiction be and it is hereby reserved by this Court for the sole purpose of making findings of fact and conclusions of law; and

3. The Court orders and directs Defendants on or before July 10, 1956 to submit proposed findings of fact and conclusions of law and that Plaintiff may file objections thereto within 20 days thereafter; such proposals and objections to be submitted under Rule 13 of this Court and heard on September 4, 1956 at 1:30 P.M.

Enter:

J. S. Perry
Judge

Chicago, Illinois
June 20, 1956

OPINION

663 The Court: Gentlemen, when I have a case before me that involves an individual or a small person and powerful persons, corporations or individuals, I realize that very often this is perhaps the court of last resort for the one without too much financial capacity. So I proceed with great care.

The same is true if I have two persons before me, neither of whom will be able to or will likely be able to appeal the case.

When this case came in here it appeared to me to be such a case. I read the complaint, I considered the motions that were made in the beginning, I considered the briefs that were submitted on the motions for summary judgment on the pleadings that were presented, I considered Mr. Dallstream's very able brief, that of Mr.
664 Hurd— at least the briefs of those firms, involving those gentlemen.

At that time, upon considering them I was almost persuaded that this case should then and there be dismissed. However, because of the nature of it, the charges and the seriousness of the charges, I felt there should be a hearing, and while probably I might legally have granted the motions, or should have granted the motions in the beginning, I felt that this case should be tried and I set it down for trial.

I have now heard the plaintiff's case, and I believe the plaintiff has had her day in court, I believe the plaintiff has failed to prove her case, and I think—I don't know that there need to be any findings of fact and conclusions of law in this case, but there is in the evidence here the work of Mr. Dallstream's firm. I have forgotten the exact name of it, Dallstream, Schiff—I should remember Mr. Schiff, he was one of my law teachers, but I have forgotten the full name of the firm—but if there is a kind of an innuendo or some sort of criticism that they did get out of this case because of their representing the purchasers in
665 this case, if they did feel that they should get out of this case because there was something they did wrong, I want the record clear that this Court has not been able to find anything wrong with the manner in which those estimable gentlemen handled this proceeding before it came to this court, nor during the time they were representing their clients here.

666 And I don't find anything wrong, if there is any indication as to the firm of Chapman & Cutler and Mr. Maland, who testified here, I don't find anything wrong with their conduct.

I don't find anything that would indicate that The First National Bank or its officials have in any way committed any breach of good etiquette.

I just don't see anything, as far as all of those organizations, firms and individuals are concerned, but proper and

ethical conduct. I think it is only fair for me to say so inasmuch as the record appears as it does.

It seems to me that the plaintiff who has been here has demonstrated by her testimony herself that she didn't know very much about this matter, and she has certainly not been hurt. She can sell her stock at a profit.

I am impressed by the fact that from the evidence as I see it, and from my common-sense understanding, I am convinced that this 7,500 shares of B stock was worth a great deal more—I don't know whether it was worth $1,-
700,000 or $2,000,000 or $1,000,000, but I know from my
667 knowledge that it was worth a great deal more, and a very substantial amount more, share for share. I don't know that the 13⅓, or whatever the ratio was, is the correct ratio, it might have been that 10 would have been a fairer ratio if I were determining it, it might have been 15, it might have been 5, but it is worth a substantial amount.

And it is my judgment that this Court cannot substitute its opinion and its judgment for that of the board of directors, where more than 90 per cent stockholders were there.

If this were a case where the record shows that there was 7,500 Class B stock that had voting rights, and the rest, the A stock or the other group of shares, the large number, also had voting rights, and there was a very insignificant difference such as a one per cent rate, or something like that, and there was a great disparity in the value—and also taking into consideration the stock market value, the quoted and the bid values, if there was something that appeared on its face or by competent evidence to show
that the corporation itself had been wronged, I would
668 feel that this was a case for the Court's interference.

Under the circumstances the motion is granted, the motion to dismiss at this time is granted for and on behalf of each of the defendants. That is the order of the Court.

190

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 54 C 1537) * *

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now come the Defendants in the above entitled cause by their respective attorneys of record, and submit the attached findings of fact and conclusions of law, and respectfully request that the Court make and state the same as the Findings of Fact and Conclusions of Law of the Court in this action.

Andrew J. Dallstream
Fredric H. Stafford
Dallstream, Schiff, Hardin,
Waite & Dorschel
Attorneys for Defendants

D. J. Harris and David S. Nerad
Thomas C. Straghan, Jr. and
Walter I. Deffenbaugh
Attorneys for Defendant
I. H. Levy

Martin J. McNally and
Nash, Ahern & McNally
Attorneys for Defendant
David B. Lichtenstein and
Lyle S. Woodcock

John F. Cashen, Jr.
Attorney for Defendant
Liberty Loan Corporation

191

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 54 C 1537) * *

This action having been tried by the Court without a jury, and the Court having sustained the motion of the Defendants to dismiss upon the merits after Plaintiff completed the presentation of her evidence,

The Court does hereby make the following Findings of Fact and does hereby state the following Conclusions of Law:

FINDINGS OF FACT.

1. Minnie Krantman, Plaintiff, is a resident and a citizen of the State of Iowa. Defendants I. H. Levy and D. J.
192 Harris and David S. Nerad are residents and citizens of the State of Illinois. Defendants David B. Lichtenstein and Lyle S. Woodcock are residents and citizens of the State of Missouri. Defendant Liberty Loan Corporation is a Delaware corporation and a citizen of that State. The amount in controversy for which Plaintiff sues derivatively in the right of and for the benefit of the Defendant Liberty Loan Corporation and the aggregate amount in controversy for which plaintiff sues as a representative of all former Class A common stockholders of said corporation each exceeds, exclusive of interest and costs, the sum of $3,000. There was no collusion between the plaintiff and any of the defendants to confer jurisdiction on this Court of this action.

2. Minnie Krantman, the plaintiff herein, through her attorney, Louis Shulman, placed an order with a broker to purchase 25 shares of Class A common stock of Liberty Loan Corporation (hereinafter called "Liberty") on September 16, 1954. On October 18, 1954 Liberty issued its certificate for said shares in the name of plaintiff. On

October 20, 1954 plaintiff filed her Complaint herein; a Supplemental Complaint was filed November 17, 1954; and an Amendment to Complaint and Supplemental Complaint was filed September 12, 1955.

193 3. Liberty was organized under the laws of Delaware in 1932 and has since been engaged in the small loan business. From then to and including November 3, 1954, it had outstanding both Class A common stock and Class B common stock, and also from time to time preferred stocks which were convertible into shares of Class A common stock. On November 3, 1954, there were outstanding 537,617 shares of Class A common stock held by about 4,000 widely scattered investors and 7,500 shares of Class B common stock, of which 7,241 shares (being approximately 97%) were owned by Key Finance Company.

4. Prior to November 3, 1954, the charter of Liberty provided that after the payment of or provision for full dividends on outstanding preferred stock, any dividends declared and paid on the Class A common stock and the Class B common stock should be declared and paid share and share alike. Also prior to November 3, 1954, the charter provided that upon liquidation after payment of or provision for the amounts due on the outstanding preferred stock the holders of the Class A common stock and of the Class B common stock were entitled share and share alike to all the remaining assets of the corporation. The charter further provided that no holder of any shares of 194 capital stock should have any pre-emptive right but that any unissued stock of any class might be issued and disposed of by the board of directors to such persons, firms, corporations or associations and upon such terms as may be deemed advisable by the board of directors in the exercise of its discretion, subject to restrictions and limitations not material here.

5. Prior to November 3, 1954, the charter of Liberty further provided that the management of all of the affairs, property and interests of the corporation was vested in a board of directors to be elected annually; that the holders of the Class A common stock voting as a class were entitled to elect a maximum minority of the total number of directors to be elected in any year and that the holders of the Class B common stock voting as a class were entitled to elect a minimum majority of said total number of directors; that upon a default equal to four quarterly dividends on preferred stock, the holders of the preferred stock voting as a class shold have the exclusive right to elect a maximum minority of the total number of directors but that the holders of the Class B stock would be en-
195 titled to continue to elect a minimum majority of such directors; and that as to any and all matters other than the election of directors, the voting power was vested solely and exclusively in the holders of the Class B common stock except as the General Corporation Law of Delaware and the charter otherwise require. Such requirements are not material to the issues in this action.

6. Originally, the Class B common stock of Liberty was issued to and held by Central States Finance Company, a corporation, of which I. H. Levy and his family group held the controlling stock. Upon the liquidation of Central States in 1939 or 1940, the Class B shares were distributed to its stockholders and since that time to and including July 19, 1954, I. H. Levy and his wife held more than one-half of such stock and through such ownership controlled Liberty.

7. On several occasions prior to July, 1954, I. H. Levy had negotiations with various companies concerning the disposition by him and members of his family of their Class B shares in Liberty. In 1951 Family Finance Cor-

poration was willing to pay $1,800,000 for the shares of Class B stock. In the latter part of 1950 and the early part of 1951 American Investment Company was willing to pay $1,700,000 for said shares of Class B stock. In 1953

American Investment Company again wished to pur-
196 chase said Class B shares and offered $1,500,000, which

amount was not acceptable to said I. H. Levy. Commencing in March, 1954, negotiations were had between I. H. Levy and certain directors of Liberty with representatives of Seaboard Finance Company, looking toward an exchange of stock of the two corporations under which the Class B shares of Liberty would be exchanged for 60,000 shares of a preferred stock of Seaboard, convertible on a share for share basis into Seaboard common stock within one year. Based upon the then market value of the Seaboard common stock, this would have produced something over $1,500,000 for the holders of the Class B common stock of Liberty but without any income tax being payable on the transaction by the holders of the Class B common stock. These negotiations and offers tended to establish a market price for the Class B common stock in the range from $1,500,000 to $1,800,000.

8. I. H. Levy, the chief executive officer of Liberty, in 1954 was reaching an advanced age. He was concerned about attracting and retaining excellent management for Liberty. The chief impediment to attracting such top flight management was the control feature of the Class B

common stock, which, by its very nature, rendered
197 the tenure of any such management insecure, being

dependent entirely upon the actions of the owners of the majority of said stock.

9. In 1954 Lichtenstein was the Executive Vice President of American Investment Company, which was then the third largest company in the small loan industry. He

was generally regarded as being one of the top executives in that field.

10. In February, 1954, Lichtenstein was granted a leave of absence from American Investment Company. Shortly thereafter, I. H. Levy met with Lichtenstein to discuss with him the possibility of Lichtenstein coming with Liberty. There were several such meetings down to May 26, 1954, during which the situation was explored generally but during which Lichtenstein consistently maintained that he was not in a position to discuss any proposition so long as he remained in the employ of American Investment Company.

11. On May 24, 1954, Lichtenstein ceased to be Executive Vice President of American Investment Company. On May 26, 1954, and May 27, 1954, he had meetings with I. H. Levy and others, including Allen E. Nix and defend-
ant Harris, two of the three Liberty directors repre-
198 senting the Class A shareholders. During the course of these meetings Lichtenstein's coming with Liberty was discussed, along with the possibility of a purchase by him of one-half of the Levy family holdings of Class B common stock. Such a purchase was determined to be unacceptable to either party because the balance of control would be left in the small number of shares not owned by either I. H. Levy or members of his family or by Lichtenstein. I. H. Levy then decided that he would not sell less than all of his holdings of Class B common stock.

12. Subsequently a group of investors, mostly from St. Louis, Missouri, was formed, and the purchase of 7,241 shares of Class B common stock of Liberty owned by I. H. Levy and members of his family for the price of $1,700,000, $881,000 payable in cash and the balance evidenced by notes fully collateralized, was negotiated on behalf of such group by Lichtenstein with Levy. These negotiations were carried on and the subsequent purchase

was consummated at arms' length and not as a part of any scheme between Lichtenstein and I. H. Levy, as charged in the Complaint or otherwise.

13. Key Finance Company, a Missouri corporation, was incorporated on or about July 2, 1954. Its stockholders were the above mentioned group of investors. An aggregate of 47% of the stock of Key Finance Company was owned originally and at the time of trial by two
199 sons and the wife of Lichtenstein, 9.7% of such stock was owned by William A. Gerard, 9.7% by Defendant Lyle S. Woodcock, and 5.5% by Anthony A. Buford (the last three being directors of Liberty who were elected to such directorships on July 20, 1954). Full information as to this stock ownership was contained in the proxy statement of September 21, 1954. Lichtenstein has never been a stockholder, director or officer of Key Finance Company, nor has any of the other Defendants except Woodcock, who was and is a stockholder.

14. On July 8, 1954, options to purchase an aggregate of 7,241 shares of Class B common stock were granted to said Key Finance Company by I. H. Levy and his wife, Louis Strilky (his brother-in-law), Harriet Levy (his daughter), and H. H. Levy (his brother) and members of the latter's family. These options related only to an outright purchase, without any contingency, condition or limitation, from I. H. Levy and the other grantors of said options of the 7,241 shares of Class B common stock of Liberty, for the aggregate price of $1,700,000. On July 19, 1954, Key Finance Company exercised said options and purchased unconditionally and became the owner of said 7,241 shares of Class B common stock without any commitment or agreement by anyone that the Class B

common stock would be reclassified or exchanged for any other stock of Liberty.

200 15. On July 20, 1954, at a special meeting of the board of directors of Liberty four members of the then existing board, Louis Strilky, H. H. Levy, F. S. Diebler, and Defendant D. S. Nerad, resigned and William A. Gerard, Anthony A. Buford, and Defendants David B. Lichtenstein and Lyle S. Woodcock were elected to fill the vacancies. Gerard and Woodcock had been officers of American Investment Company and each had had long experience in the small loans business and were part of the management being provided by Lichtenstein to Liberty. These resignations and elections occurred prior to any other business considered at the meeting, except the amendments of by-laws and the election of I. H. Levy as chairman of the board.

16. At the same meeting both Gerard and Woodcock were elected as Vice Presidents and Lichtenstein was elected President of Liberty. Also, the office of Chairman of the Board was created, and I. H. Levy was elected Chairman to serve until the next annual meeting of directors. His compensation was fixed at an annual rate of $40,000 to commence August 1, 1954. At the same meeting his resignation as President was accepted and his salary for that office, which had been $65,300 for 1953,

201 terminated.

17. At the same meeting of July 20, 1954, the Employees' Stock Purchase Plan was unanimously adopted by the directors. It provided for the issuance of up to 115,000 shares of Class A common stock, under an installment payment program providing for payments over a period of not exceeding five years, to officers and employees (or members of their families or family trusts) determined by the directors to be key employees in carrying out the future expansion and growth of Liberty.

18. The shares issued under said Plan were party paid and assessable shares, although the purchaser, upon issuance, was vested with full and complete title. Such shares carried the right to vote the same as fully paid shares but were restricted as to dividends so as to receive only the proportionate part of dividends declared and paid in proportion to the amount paid in on the shares. Rights of such shares upon liquidation were similarly restricted. The Plan provided for payments as follows: an aggregate amount equal to $1 for each share purchased payable at the date of purchase; an aggregate amount equal to $1 for each share purchased due one year after purchase;
202 an aggregate amount equal to $1.50 for each share purchased due two years after purchase; a like amount due three years after purchase; an aggregate amount equal to $2 for each share purchased due four years after purchase; and a final installment in the aggregate amount equal to the balance remaining unpaid with respect to all shares purchased due five years after date of purchase.

19. The Plan also provided that no shares could be assigned or transferred except by operation of law until after the lapse of the period of thirty days from and after the time the shares purchased had become fully paid and non-assessable shares. The first payment made by any purchaser was to be applied ratably toward the purchase price of all of the shares purchased; subsequent payments were to be applied upon and towards the full payment of the purchase price of as many of the shares being purchased under the Plan as such payments should suffice so that the largest number of partially paid shares should become fully paid or as nearly fully paid as possible by each such payment.

20. No purchaser could anticipate any one or more of the installments or make payments in excess of the aggregate amount of each thereof until Liberty, for a period

203 of six consecutive calendar months, should have had consolidated net income, as defined in the Plan, equal to 90¢ per share (which would reasonably insure the continuation of payment of the pre-existing annual dividend on the Class A common stock of $1.50) on all fully paid Class A common stock and Class B common stock and on all partly paid and assessable shares which were to become fully paid by reason of the excess or advance payment, and a proportionate amount on all partially paid Class A common stock which was not to become fully paid by reason of the excess or advance payment.

21. Both the Plan itself and the resolution of the board of directors adopting same provided that the Plan should be submitted to the stockholders at either a special meeting or at the next annual meeting thereof and that the Plan should terminate and be rescinded unless approved and authorized at such meeting by the holders of a majority of each class of the then outstanding stock.

22. The Employees' Stock Purchase Plan was adopted by the board of directors for the purpose of attracting and keeping new management for Liberty and, more specifically, the new management headed by defendant Lichtenstein; to encourage executives and other employees to obtain an investment interest in the enterprise; and to secure greater incentives for outstanding services to the corporation.

204 23. Initially, the board of directors authorized the issuance of 93,600 shares of Class A common stock under the Employees' Stock Purchase Plan, which shares were issued on July 20, 1954, to officers and to certain key employees, some of whom were proposed by I. H. Levy and the remainder by Lichtenstein. Of these shares, Lichtenstein and members of his family, or trusts of which they were beneficiaries, were allotted and purchased an aggregate of 68,600 shares, Woodcock was allotted and pur-

chased 9,500 shares, and Gerard was allotted and purchased 9,500 shares, all of which information was set forth in the proxy statement of September 21, 1954, Plaintiff's Exhibit three (3) herein.

24. No shares have been issued under the Employees' Stock Purchase Plan other than the 93,600 shares hereinabove referred to, which were issued at the total price of $17 per share payable as described in finding No. 18. This price for these restricted shares was reasonably related to the market value of fully paid and unrestricted shares of Class A common stock for the period from June 1 to and including July 20, 1954, that the bid price on July 20, 1954 was 20½ and the asked price on said date was $21¾, during which period from June 1 to July 20 the bid quotations ranged from 18½ to 20 and the ask quotations ranged from 19¾ to 21¾. It was also reasonably related to the book value of the fully paid and unrestricted Class A common stock which, as stated in the proxy statement 205 of September 21, 1954, was $16.45 at June 30, 1954.

The remaining 21,400 shares can be issued only at such price or prices as the board of directors of Liberty may determine, but not less than $17 per share.

25. No proof was adduced by plaintiff that the action of the board of directors of Liberty in adopting said Employees' Stock Purchase Plan, in recommending the same to stockholders, in allocating shares thereunder and in fixing the price for such shares, was not in good faith or was in any way fraudulent or unfair.

26. At the July 20, 1954, meeting a possible merger of Metropolitan Loan & Investment Company and Metro Finance Co. with and into Liberty was discussed and Lichtenstein, as President, was authorized to enter into agreements with said companies looking toward such merger. The first discussions that Lichtenstein had had with any

representatives of either Metropolitan or Metro concerning a possible merger with and into Liberty occurred on July 11, 1954. A formal Plan and Agreement of Merger was entered into between the three companies involved, dated as of September 1, 1954, to be deemed an agreement only upon, among other things, due adoption thereof by the stockholders of the three companies. A copy thereof was submitted to the stockholders with the proxy statement of September 21, 1954. On September 1, 1954 the directors of Liberty approved this Plan and
206 Agreement of Merger (hereinafter sometimes called "Merger"), authorized its execution and the submission of the same to a vote of the stockholders.

27. No proof was adduced by the plaintiff that the action of the board of directors of Liberty in approving said Merger and recommending and submitting the same to a vote of the stockholders was not taken in good faith or was in any way fraudulent.

28. This Merger provided, among other things, for a reclassification of the 7,500 shares of Class B common stock of Liberty into 100,000 shares of common stock of the surviving corporation, being on an exchange ratio of 13⅓ shares of new common for each share of Class B, and the exchange of Class A common stock of Liberty for new common on a share for share basis, thereby leaving the surviving corporation with only one class of stock, each share having full voting power on all matters.

29. The necessity for eliminating the Class B stock with the consequent transfer of control of Liberty from that stock to all of the stockholders as a single class, in order to attract and keep and build up top flight management and key personnel, and to give to Liberty the other advantages set forth in the proxy statement flowing from such elimination, was recognized by Lichtenstein in

his early discussions and later negotiations with I. H. Levy. The stockholders were advised in the proxy statement that the reclassification on the 13⅓ for one basis
embodied in the proposed merger had been discussed
207 during the negotiations for the purchase of the Class B
common stock by Key Finance Company from I. H. Levy and members of his family, and that the three continuing directors (I. H. Levy, Allen E. Nix and David S. Harris) were in favor of such a program in view of the necessity of strengthening the management of Liberty, obtaining services of experienced key personnel and the advisability of eliminating the Class B common stock.

30. The Class B common stock, with its control of Liberty which was surrendered in and by the merger reclassification, was entitled to a substantially greater number of shares of the common stock of the surviving corporation per share than the Class A common stock was entitled to receive per share. The reclassification of 7,500 shares of Class B common stock into 100,000 shares of the common stock of the surviving corporation, restricted as to dividends as hereinafter found, was not fraudulent.

31. The exchange ratio, expressed both in terms of 13⅓ shares of new common for one share of Class B common stock and also in terms of 100,000 shares of new common for 7,500 shares of Class B common stock, appears
and in several places in the proxy statement of Sep-
208 tember 21, 1954, along with complete information as
to the price paid by Key Finance Company to I. H. Levy and the other sellers of the 7,241 shares of Class B common stock. The cost of the entire 7,500 shares of Class B common stock (applying the average price paid for the Levy group of shares to the remaining 259 shares) translated into the 100,000 shares of new common would amount to $17.61 per share of such new common, which figure was reasonably related to the market price

and to the book value of the Class A common stock during the period preceding the purchase, being somewhat less than the market price and somewhat greater than the book value.

32. The 100,000 shares of common stock of the surviving corporation exchanged for the Class B common stock of Liberty were restricted as to dividends, receiving only 7½% of the dividends declared and payable on the other shares of such common stock until for a period of six months the consolidated net income of Liberty (as the surviving corporation) and its subsidiaries, as defined and set out in the proxy statement, should have been not less than 90¢ per share on all fully paid shares of common stock outstanding at the end of the period, including the 100,000 shares of stock so restricted, plus a proportionate amount applicable to the partially paid and 209 assessable shares of common stock outstanding at the end of the period. The shares of new common stock issued to the holders of the Class A common stock of Liberty and to the stockholders of Metropolitan and Metro were not so restricted.

33. The proxy statement sets forth correctly on a pro forma basis and upon the assumptions therein stated the effect that such reclassification would have upon the book value of the Class A and the Class B common stocks expressed in dollar figures per share, and the proxy statement also sets forth correctly the effect the reclassification would have on the earnings available for dividends on each class, again expressed in dollar figures per share.

34. There are no misrepresentations of any kind in the proxy statement of September 21, 1954, and there was no omission of any material fact. Full information as to both the Employees' Stock Purchase Plan and the proposed Merger, including the reclassification of the 7,500 shares of Class B common stock of Liberty into

100,000 shares of common stock of the surviving corporation, was presented, in clear and understandable manner, in said proxy statement, which was sent to all stockholders of record on September 21, 1954, together with a formal notice of the stockholders' meeting to be held November 3, 1954, to vote on both of such matters.

35. On November 3, 1954, the stockholders of Liberty voted in favor of both the Employees' Stock Purchase Plan and also the Plan and Agreement of Merger. 382,740 shares of Class A common stock present in person or by proxy, being 86.2% of the Class A common stock (excluding stock sold pursuant to the Employees' Stock Purchase Plan which did not vote on the proposition) and 98.8% of the Class B common stock voted to approve and authorize the Employees' Stock Purchase Plan. Only 3.5% of the Class A common stock and none of the Class B common stock was voted against the approval and authorization of said Plan. 486,938 shares of Class A common stock, including 93,000 shares sold pursuant to the Employees' Stock Purchase Plan, and 7,409 shares of the Class B common stock, being 90.7% of all the shares entitled to vote, voted in favor of the Merger (which included the reclassification of the Class B stock into 100,000 shares of the new common stock). Less than 1% of all the shares entitled to vote were voted against the Merger.

36. The entry of the new management into Liberty, the Employees' Stock Purchase Plan and the proposed Merger, including the reclassification of the Class B common stock of Liberty into a single class, together with the ratio of reclassification of that stock, was widely publicized by newspaper releases, in the Wall Street Journal, and in various financial publications, such as Dow Jones, Moody's Banks & Finance, and Standard & Poor's. The full details of both proposals were set

forth extensively in the Moody's publication dated September 11, 1954, following an earlier summary thereof dated July 24, 1954, and in Standard & Poor's Standard Corp. Records, "Daily News Section" of September 13, 1954.

37. As stated in the Proxy Statement of September 21, 1954, a group of securities dealers was formed by Riter & Co., Edward D. Jones & Co. and Fairman Harris and Company, Inc. for the purpose of soliciting from stockholders of the corporation proxies in favor of the Merger. No decision to organize and use a proxy soliciting group was reached and no fee or division thereof was determined until September 1, 1954. The matter was fully discussed and authority given at the meeting of directors of Liberty on that date. Full information as to all fees to be paid such securities dealers was set forth in the proxy statement, both as to the amount to be paid to the managing group of the dealers and the 15¢ per share payable to dealers for obtaining proxies favorable to the adoption of the Merger. The payment of such fees was not fraudulent, unreasonable or improper.

212 38. There is no evidence that the vote cast by any stockholder in favor of the Plan and Agreement of Merger was in any way affected by or the result of the payment of fees or compensation to any soliciting dealer, or that such vote was cast by any such stockholder other than as the result of the free and independent best judgment of such stockholder. The form of proxy submitted to the stockholders provided for voting for or against both propositions and that where no specific instruction was given, the proxies would vote the shares in favor of both the Employees' Stock Purchase Plan and the Merger. All proxies received were voted in accordance with the instructions of the stockholders.

39. In the last year or two prior to July, 1954 the management headed by I. H. Levy lacked depth of adequate personnel, particularly in properly trained supervisory personnel. During such period Liberty had not progressed and was beginning to decline, both in business volume and earnings, in contrast to the trend of other companies in the industry toward continued and increased growth during such period.

40. When Lichtenstein brought in his new management, he recognized that at least for a transition period it would be good business to retain some or all of the principal executives of the I. H. Levy management. 213 This was accomplished by electing I. H. Levy as chairman of the board and by retaining the services of H. H. Levy and Louis Strilky under term contracts requiring them to continue to do essentially the same duties which they had previously performed.

41. The salaries of I. H. Levy, H. H. Levy and Louis Strilky were substantially reduced. The aggregate reductions enabled Liberty to pay the salaries of the new top management personnel brought in by Lichtenstein without increasing the overhead for executive salaries.

42. The employment arrangements covering the services of I. H. Levy, H. H. Levy, and Louis Strilky, were bona fide arrangements entered into for the purpose of securing actual services to be rendered by them and each of them to Liberty Loan Corporation and for the purpose of preventing them from rendering services to competitors of Liberty. The compensation paid to I. H. Levy, H. H. Levy, and Louis Strilky and each of them was compensation for services actually rendered by them and each of them and was not part of the purchase price of Class B shares sold to Key Finance Company by I. H. Levy and his associates. I. H. Levy has at all times rendered and is still rendering substantial personal serv-

ices as Chairman of the Board of Liberty Loan Corporation. H. H. Levy and Louis Strilky rendered sub-
214 stantial personal services pursuant to their contracts of employment until the respective dates upon which their contracts of employment were terminated.

43. During the period from July 20, 1954 to and including the commencement of the trial of this action, the management headed by Lichtenstein has accomplished a considerable growth on the part of Liberty in its outstandings or accounts receivable (which are the backbone of the company's business), its lines of credit, its scope and size of operations, its earnings and its position in the industry. Also, since July 20, 1954 the market value of the Class A common stock and, since November 3, 1954, of the common stock of the surviving corporation has steadily increased, and in the first eleven days of June, 1956, it was quoted from 32 high to 31½ low on the bid side and 32½ high to 32¼ low on the asked side.

44. Specifically, during this period the outstandings or accounts receivable of Liberty increased from approximately $20,000,000 to $36,500,000, or better than 75%; its number of accounts increased during the same period about 71%; the entire industry increased during said period about 26% whereas Liberty increased about 67%. The earnings of Liberty for the first five months of 1956 have been at the rate of in excess of $100,000 per
215 month, which was fifty per cent higher than Liberty's earnings had ever been.

45. During the same period Liberty increased its bank lines of credit, which are vital to the success and growth of finance companies, from approximately $20,000,000 to $29,000,000. Additionally, Liberty has obtained $6,500,000 of funds from insurance company loans, and at the time of trial had commitments for an additional $8,500,000 of such funds.

46. Also, during the same period, the company increased its offices from 66 to 127, and increased the scope of its business activities from seven states to fifteen at the present time. In 1954 Liberty was about thirtieth in the small loan industry, and at the time of the trial it had increased its position to substantially in the area of tenth.

47. From the evidence it does not appear that any of the defendants entered into a scheme to defraud the former Class A stockholders or Liberty, itself; nor does it appear from the evidence that any of the defendants, singly or in concert, committed any fraud against the Class A stockholders or Liberty.

216 CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties to and the subject matter of this action.

2. Since Liberty Loan Corporation is a Delaware corporation, the issues presented in this action are governed by the law of the State of Delaware.

3. Under the Delaware law, a minority shareholder has a statutory right to object to any proposed merger of his corporation with any other corporation, and to have his stock appraised and the appraised value paid to him by the surviving corporation.

4. Under the law of the State of Delaware where, as here, both the Employees' Stock Purchase Plan and the Plan and Agreement of Merger have received the favorable vote of more than two-thirds of the stockholders, such Employees' Stock Purchase Plan and such Plan and Agreement of Merger are presumed to be fair and cannot be successfully attacked by dissident stockholders except upon a showing of actual or constructive fraud.

5. Neither the Employees' Stock Purchase Plan nor the Plan and Agreement of Merger, nor any of the terms

and provisions of either, nor any action by any of the Defendants herein as shown by the evidence herein constituted actual fraud or amounted to constructive fraud.

217 6. Although the Employees' Stock Purchase Plan was by the Board of Directors of Liberty submitted to the stockholders for termination or rescission, under the law of the State of Delaware the board of directors of Liberty had power and authority to adopt the Employees' Stock Purchase Plan and to issue shares thereunder and to fix the consideration to be received therefor without submitting the matter to a vote of the stockholders.

7. The Plaintiff has failed to establish by the evidence adduced that she or the Class A stockholders whom she represented or Liberty was entitled to any relief against any of the Defendants.

8. The equities of this action are with the Defendants and against the Plaintiff.

Enter and File:

/s/ J. S. Perry
United States District Judge

Chicago, Illinois
September 4, 1956.

218

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

MINNIE KRANTMAN,
Plaintiff,
vs.
LIBERTY LOAN CORPORATION, a Delaware corporation, I. H. LEVY, D. J. HARRIS, DAVID B. ICHTENSTEIN, LYLE S. WOOLLOCK and DAVID S. NERAD,
Defendants.
No. 54 C 1537

NOTICE OF APPEAL
(filed Sept. 20, 1956)

Plaintiff, Minnie Krantman, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the decree of June 20, 1956, dismissing the above cause on its merits for want of equity at the end of plaintiff's case; and appeals from the Order of September 4, 1956, overruling plaintiff's Motion for a New Trial; and appeals from the Order of September 4, 1956, overruling plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law.

Louis Shulman
Burton H. Young
Irwin J. Askow
Richard James Stevens
By /s/ Richard James Stevens
Attorneys for Plaintiff-Appellant

219 United States of America)
Northern District of Illinois) ss:

• • (Caption—No. 54 C 1537) • •

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 20th day of September, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Nash, Ahern and McNally
111 West Washington Street
Chicago 2, Illinois

Dallstream, Schiff, Hardin, Waite and Dorschel
231 S. LaSalle Street
Chicago 4, Illinois

John F. Cashen, Jr.,
190 North State Street
Chicago, Illinois

Pope and Ballard
120 S. LaSalle Street
Chicago 3, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 20th day of September, 1956.

Roy H. Johnson, Clerk
By Gizella Butcher,
Deputy Clerk

(Seal)

225 United States District Court)
Northern District of Illinois) ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: Minnie Krantman, Plaintiff *vs.* Liberty Loan Corporation, a Delaware corporation, I. H. Levy, D. J. Harris, Davis B. Lichtenstein, Lyle S. Woodcock and David S. Nerad, Defendants, No. 54 C 1537 as follows:

Complaint filed October 20, 1954.

Notice filed October 27, 1954.

Order entered October 27, 1954 granting leave to plaintiff to amend complaint.

Supplemental Complaint filed November 9, 1954.

Motion of I. H. Levy, et al., certain defendants to dismiss filed December 10, 1954.

Motion of Liberty Loan Corporation, a defendant to dismiss filed December 10, 1954.

Order entered March 15, 1955 that insofar as the complaint and supplemental complaint embody plaintiff's request for individual relief dismissed for want of jurisdiction—order motion of several defendants to dismiss denied, etc.

Answer of Liberty Loan Corporation, a Delaware corporation, I. H. Levy, D. J. Harris, David B. Lichtenstein, Lyle S. Woodcock and David S. Nerad, filed July 25, 1955.

Amendment to Complaint and Supplemental Complaint filed September 22, 1955.

Brief in support of amendment to complaint and supplemental complaint filed September 22, 1955.

226 Brief in opposition to amendment to complaint and supplemental complaint filed October 12, 1955.

Plaintiff's reply brief in support of her amendment to complaint and supplemental complaint filed October 21, 1955.

Order entered November 10, 1955 overruling contentions of defendants without prejudice to the defendants raising the same matters at the close of all the evidence.

Order entered January 12, 1956 dismissing defendants Anthony A. Buford, William A. Gerard and Allen J. Nix.

Amendment to Answer filed June 8, 1956.

Order of June 15, 1956 admitting Louis Shulman, etc.

Decree entered June 20, 1956 dismissing cause.

Order entered June 20, 1956 taking under advisement plaintiff's motion for new trial.

Plaintiff's motion for new trial filed June 27, 1956.

Plaintiff's Objections to Defendants' Proposed Findings of Fact and Conclusions of Law filed September 4, 1956.

Order entered September 4, 1956 denying plaintiff's motion for a new trial.

Defendant's Proposed Findings of Fact and Conclusions of Law. Received July 9, 1956, and entered September 4, 1956.

Plaintiff's Notice of Appeal filed September 20, 1956.

Appearance of Appellees and attorneys filed October 24, 1956.

Stipulation with true copy of Answer to Amendment to Complaint and Supplemental Complaint attached filed October 24, 1956.

Filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of October, 1956.

Roy H. Johnson, Clerk
By Gizella Butcher,
Deputy Clerk

(Seal)

Office - Supreme Court, U.S.
FILED
OCT 24 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRWIN S. ASKOW
RICHARD JAMES STEVENS
BURTON H. YOUNG
Counsel for Petitioner

ASKOW and STEVENS
BURTON H. YOUNG
7 South Dearborn Street
Chicago 3, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	4
Statement of the Case	6
Basis of Federal Jurisdiction in the Court of First Instance	13
Argument	14
Conclusion	20

INDEX TO APPENDIX.

Opinion of the Court of Appeals	1a
Plaintiff's Exhibit 23	4a
Plaintiff's Exhibit 29	5a
Statute Involved	7a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Minnie Krantman, the plaintiff in the trial court, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Case No. 11903 affirming the judgment of the trial court dismissing the plaintiff's case for want of equity at the close of plaintiff's case.

OPINION BELOW.

The opinion of the trial Judge, the Honorable J. Sam Perry, Judge of the United States District Court for the Northern Division of Illinois, Eastern District, is reported in 152 F. Supp. 705 under the name *Minnie Krantman* v. *Liberty Loan Corporation, et al.* The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 246 F. 2d 581 under the name *Minnie Krantman* v. *Liberty Loan Corporation, et al.* The opinion of the Court of Appeals appears in the Appendix to this Petition, page 1a. The opinion of the trial court appears on pages 37 to 59 in Appendix to Appellant's Brief certified as part of the record.

JURISDICTION.

The date of the judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed is July 29, 1957. The time of the entry of said judgment was July 29, 1957.

No order respecting a rehearing was entered.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, U. S. C. Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals correctly interpret Rule 52 (a) Federal Rules of Civil Procedure, 28 U. S. C. as requiring an affirmance of the judgment when at no time was there any conflict as to any evidentiary fact, the only dispute being whether in law the actions of the individual defendants constitute a breach of their fiduciary duties, a gift of corporate assets to themselves, and a fraud upon the Liberty Loan Corporation and its Class A stockholders?

2. Did the Court of Appeals correctly apply Delaware law in ignoring Article IX Section 3 of the Constitution of the State of Delaware, Section 122 (9) of the Delaware Corporation Law (Volume 4, Delaware Code Annotated, Title 8, Section 122 (9)) and the Delaware case law in affirming Judge Perry's decision that no gift of corporate assets or fraud occurred when the newly elected Board of Directors of Liberty Loan Corporation under the presidency of defendant, David B. Lichtenstein, on July 20, 1954, voted to issue 68,000 shares of Class A stock under the Employees' Stock Purchase Plan to defendant Lichtenstein and his family at a price of $17.00 per share when the market price of the Class A shares was 21-1/8?

3. Did the Court of Appeals correctly apply Delaware law in ignoring Article IX, Section 3 of the Constitution of the State of Delaware, Section 122(a) of the Delaware Corporation Law, and the decided cases of Delaware and other jurisdictions in affirming Judge Perry's decision that no fraud or gift of corporate assets occurred when 7500 Class B shares of Liberty Loan Corporation (7241 of which were owned by Lichtenstein's group) having a book value of $125,353 and annual dividend rights to 1 6% of the dividends were re-classified into 100,000 common shares having a book value of $1,388,049 and annual dividend rights (after $.90 per share once was earned) of 17.3% of the dividends, and the Class A shares correspondingly suffered a decrease in book value from $7,421,158 to $6,163,174 and a decrease in dividend rights from 97.2% to 77.7% of the dividends of Liberty Loan Corporation?

4. Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligations of defendant Lichtenstein in (1) the purchase by Lichtenstein and his family of 68,000 Class A shares of Liberty

Loan Corporation at a price of $280,500 below the market for Class A shares, and (2) in the participation by Lichtenstein in the reclassification of 7500 Class B shares of Liberty Loan Corporation with an equity of $125,353 to 100,000 common shares with an equity of $1,388,049.00?

5. Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligations of defendant, I. H. Levy, Chairman of the Board of Directors of Liberty Loan Corporation, as to the transaction in which Levy and his relatives received $1,700,000.00 for the sale of 7241 controlling Class B shares of Liberty Loan Corporation, which had a book value of $121,024 and annual dividends of $10,861.50?

6. Did the Court of Appeals correctly refrain from considering whether the vote of shareholders of the Liberty Loan Corporation constituted a ratification of the Employees' Stock Purchase Plan and the reclassification of Class B shares as part of a merger when $48,463.65 of the corporation's money was paid to 72 securities dealers for the solicitation of favorable Class A votes?

7. Did the decision of the Court of Appeals by its complete neglect of the legal issues of the case so depart from the abiding principles of judicial procedure and so constitute a gross miscarriage of justice as to call for the exercise by the Supreme Court of its power of supervision?

STATUTES INVOLVED.

The Statutes, Constitutional Provisions and Rule involved are as follows:

1) Delaware State Constitution, Article IX, Section 3: "No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."

(Vol. 1, *Delaware Code Annotated,* page 321)

2) Vol. 4, *Delaware Code Annotated,* Title 8, Section 122 (9); Section 122 (9) Delaware Corporation Law:

"Section 122. *Specific Powers.*

Every corporation created under the provisions of this Chapter shall have power to * * * (9) Make donations for the public welfare or for charitable, scientific or educational purposes; * * *"

3) Vol. 4, *Delaware Code Annotated,* Title 8, Section 152; Section 152 Delaware Corporation Law:

§ 152. Issuance of stock; lawful consideration

Subscriptions to, or the purchase price of, the capital stock of any corporation organized under this Code or any other law of this State may be paid for, wholly or partly, by cash, by labor done, by personal property, or by real property or leases thereof; and the stock so issued shall be declared and taken to be full paid stock and not liable to any further call, nor shall the holder thereof be liable for any further payments under the provisions of this chapter. In the absence of actual fraud in the transaction, the judgment of the directors, as to the value of such labor, property, real estate or leases thereof, shall be conclusive.

4) Vol. 4, *Delaware Code Annotated,* Title 8, Section 262; Section 262 Delaware Corporation Law. This lengthy section appears in the Appendix to this Petition.

5) Rule 52, Rules of Civil Procedure for the United States District Court.

Rule 52. *Findings of the Court.*

(a) Effect. * * *

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

STATEMENT OF THE CASE.

This is a stockholder's derivative suit brought by Minnie Krantman, who purchased 25 Class A shares of Liberty September 16, 1954 (Finding 2, Apx. 41).*

Prior to the stockholders' meeting of November 3, 1954, 7500 Class B common shares without par value and 537,617 $5.00 par value Class A shares of Liberty were outstanding (Finding 3, Apx. 42). 93,600 of the Class A shares were partially paid shares issued under the Employees' Stock Purchase Plan (Findings 23 and 24, Apx. 49, 50). 444,017 Class A shares were fully paid and were held by about 4000 widely scattered investors (Finding 3, Apx. 42).

The Class B shares had dividend rights identical with those of the Class A shares, share for share. The Class B stock had rights on liquidation identical with those of the Class A shares, share for share (Finding 4, Apx. 42). The 7500 Class B shares had the right to elect a minimum majority of the directors of Liberty. The Class A stock had the right to elect the maximum minority of the Directors (Finding 5, Apx. 43).

Originally the 7500 Class B shares were issued to Central States Finance Company, a corporation, in which defendant, I. H. Levy, and his family held controlling stock (Finding 6, Apx. 43). Liberty received $10.00 a share or a total of $75,000 upon the issuance of the 7500 Class B shares. (Apx. 13) Upon the liquidation of Central States in 1939 or 1940, the Class B shares were distributed to its stockholders, and since that time until July 19, 1954, I. H. Levy and his wife held more than ½ of the Class B stock and through such ownership controlled Liberty (Finding 6, Apx. 43).

---

* References are to Appendix to Appellant's Brief in the Court of Appeals unless otherwise indicated.

On several occasions prior to July, 1954, I. H. Levy had negotiations with and offers from other finance companies in amounts varying between $1,500,000.00 and $1,800,000.00 for the purchase of 7241 Class B shares held by Levy and his relatives (Finding 7, Apx. 43-44). None of these negotiations matured into a sale (Apx. 9). The only evidence in the record of a sale of Class B stock prior to July 19, 1954 was a purchase by I. H. Levy of 43 shares of Class B stock in March or April of 1954 at $20 to $21 per share (Apx. 9).

Following meetings between Lichtenstein and Levy on May 26 and May 27 (Finding 11, Apx. 45), a group of investors from Missouri through Lichtenstein negotiated a purchase of the 7241 Class B shares held by the Levy family for a price of $1,700,000.00 (Finding 12, Apx. 45).

This group of investors incorporated Key Finance Company, a Missouri corporation, July 2, 1954 (Finding 13, Apx. 46). 47% of the stock of Key Finance Company was owned originally and at the time of the trial by Lichtenstein's wife and two sons (Finding 13, Apx. 46). Lichtenstein's brother owned an additional 12% (499/3665ths) of Key Finance Company (Apx. 21, 26). 9.7% of the stock of Key was owned by William A. Gerard, 9.7% by defendant, Lyle S. Woodcock, and 5.5% by Anthony A. Buford. The last three named persons became directors of Liberty on July 20, 1954 (Finding 13, Apx. 46).

On July 8, 1954, options to purchase 7241 Class B shares were granted to Key Finance Company by I. H. Levy and his wife, Louis Strilky (Levy's brother-in-law), Harriet Levy, (his daughter), and H. H Levy (his brother) and members of H. H.'s family, for $1,700,000. On July 19, 1954, Key exercised the options and became the owner of the 7241 Class B shares, without any commitment that the Class B shares would be reclassified (Finding 14, Apx. 46).

On July 20, 1954, a special meeting of the Board of Directors of Liberty, four members of the seven-man board resigned and William A. Gerard, Anthony A. Buford, David B. Lichtenstein and Lyle S. Woodcock were elected to fill the vacancies (Finding 15, Apx. 47).

At the same meeting both Gerard and Woodcock were elected as Vice Presidents and Lichtenstein was elected President of Liberty. Also, the office of Chairman of the Board was created, and I. H. Levy was elected Chairman. His compensation was fixed at an annual rate of $40,000. At the same meting his resignation as President was accepted and his salary for that office, which had been $65,300 for 1953, terminated. (Finding 16, Apx. 47)

The Employees' Stock Purchase Plan.

At the same meeting of July 20, 1954, the Employees' Stock Purchase Plan was adopted unanimously by the directors. It provided for the issuance of up to 115,000 shares of Class A common stock, under an installment payment program providing for payments over a period of not exceeding five years, to key officers and employees of Liberty. (Finding 17, Apx. 47)

The shares issued under the Plan carried the right to vote the same as fully paid shares. They were to receive dividends declared in proportion to the amount paid in on the shares. Rights of such shares upon liquidation were similarly restricted in proportion to the amount paid in on the shares. The Plan provided for payments as follows: $1.00 for each share purchased payable at the date of purchase; $1.00 for each share purchased due one year after purchase; $1.50 for each share purchased due two years after purchase; a like amount due three years after purchase; $2 for each share purchased due four years after purchase; and a final installment of the

balance five years after date of purchase. (Finding 18, Apx. 48)

The Plan provided that no shares could be transferred except by operation of law until after the lapse of the period of thirty days after the time the shares purchased had become fully paid and nonassessable shares. The first payment made by any purchaser was to be applied ratably toward the purchase price of all of the shares purchased; subsequent payments were to be applied towards the full payment of the purchase price of as many of the shares as possible. (Finding 19, Apx. 48)

The Plan provided that it should be submitted to the stockholders and should be rescinded unless approved by a majority of each class of the then outstanding stock. (Finding 21, Apx. 49).

Initially, the Board of Directors authorized the issuance of 93,600 shares of Class A common stock under the Employees' Stock Purchase Plan, which shares were issued on July 20, 1954 to officers and certain employees, some of whom were proposed by I. H. Levy and the remainder by Lichtenstein. Of these shares Lichtenstein and members of his family or trusts of which they were beneficiaries purchased 68,000 shares. Woodcock purchased 9500 shares, and Gerard purchased 9500 shares. This information was set forth in the proxy statement of September 21, 1954 to the stockholders (Finding 223, Apx. 49-50).

On July 20, 1954, the date of the issuance of the shares to Lichtenstein under the Employees' Stock Purchase Plain at a price of $17.00 per share, the bid price of the Class A common stock of Liberty was 20-½, the ask price 21-¾. (Finding 24, Apx. 50). Thus, Lichtenstein and his family purchased 68,000 Class A shares under the Em-

ployees' Stock Purchase Plan at a price $280,500 below the market for a comparable number of Class A shares on terms of $1.00 per share down, the balance payable, without interest, over a five-year period.

No consideration in the form of an employment contract (Apx. 11) or a non-compete agreement (Apx. 25) passed between Liberty and Lichtenstein for the difference of $4.12½ per share between the purchase price under the plan and the market price of the Class A stock.

By the time of trial several participants in the Employees' Stock Purchase Plan had left Liberty (Apx. 11).

The reclassification of Class B shares.

At the July 20, 1954 meeting, a possible merger of Metropolitan Loan & Investment Company and Metro Finance Co. with Liberty was discussed. The first discussions that Lichtenstein had had with any representative of either Metropolitan or Metro concerning a possible merger with Liberty occurred on July 11, 1954. On September 1, 1954 the directors of Liberty approved a Plan and Agreement of Merger and authorized its submission to a vote of the stockholders. (Finding 26, Apx. 51)

This Merger provided, among other things, for a reclassification of the 7,500 shares of Class B Common stock of Liberty into 100,000 shares of common stock of the surviving corporation, being on an exchange ratio of 13-⅓ shares of new common for each share of Class B, and the exchange of Class A common stock of Liberty for new common on a share for share basis, thereby leaving the surviving corporation with only one class of stock, each share having full voting power on all matters. (Finding 28, Apx. 51)

The 100,000 shares of common stock of the surviving corporation exchanged for the Class B common stock of Liberty were restricted as to dividends, receiving only 7½% of the dividends declared on other shares of common, until the net income of Liberty was $.90 per share in one six-month period. (Finding 32, Apx. 53)

This condition had occurred by the time of the trial (Apx. 13, 30) so that the dividend restriction has been removed permanently and the 100,000 shares issued for the 7500 Class B shares have equal dividend rights with the other common shares of Liberty.

Prior to the reclassification, the book value of both the Class A and Class B common stock was $16.71 per share. The total equity of the 444,017 fully paid Class A shares was $7,421,158. The total equity of the 7500 Class B shares was $125,353.

As of December 31, 1954, following the reclassification of shares, the book value per share of the 444,017 common shares of Liberty was $13.88 per share, a shrinkage of $2.83 per share or total shrinkage of $1,257,984 in equity for all 444,017 Class A shares. The 100,000 common shares exchanged for the 7500 Class B shares had a total equity of $1,388,049, a total increase of $1,262,696, an increase of $168.36 per former Class B share.

After reclassification and the $.90 per share earning condition had occurred, the 100,000 common shares exchanged for the 7500 Class B shares were entitled to 17.3% of the dividends in Liberty, an increase from $11,250 to $150,000 per year based on the annual $1.50 per share dividend. On the other hand, the former Class A shareholders were entitled to only 77.7% of the dividends. (Plaintiff's Exhibit 23 is the basis for the statements in the preceding three paragraphs. That Exhibit is printed as part of the Appendix to this Petition.)

Stockholders' meeting of November 3, 1954.

A fully proxy statement was sent to all stockholders September 21, 1954 with the formal notice of a meeting to be held November 3, 1954 (Finding 34, Apx. 54).

A group of securities dealers was formed by Riter & Co., Edward D. Jones & Co., and Fairman Harris and Company, Inc., for the purpose of soliciting from the stockholders of the corporation proxies in favor of the merger. $.15 per share was payable to dealers for obtaining favorable proxies (Finding 37, Apx. 55). The favorable vote of 173,091 shares of Class A stock on merger and Employees' Stock Purchase Plan was procured by the solicitation of 72 securities dealers for which they were paid $48,463.65 The amount paid to securities dealers includes a fee of $22,50[illegible] paid to the three principal dealers (Apx. 23, Plaintiff's Exhibit 29, Appendix to this Petition).

On November 3, 1954, the stockholders of Liberty voted in favor of both the Employees' Stock Purchase Plan and the Merger. 382,740 shares of Class A common stock present in person or by proxy, being 86.2% of the Class A common stock (excluding stock sold pursuant to the Employees' Stock Purchase Plan which did not vote on the proposition) and 98.8% of the Class B common stock voted to approve the Employees' Stock Purchase Plan. 3.5% of the Class A common stock and none of the Class B common stock was voted against the approval and authorization of said Plan. 486,938 shares of Class A common stock, including 93,000 shares sold pursuant to the Employees' Stock Purchase Plan, and 7,409 shares of the Class B common stock, being 90.7% of all the shares entitled to vote, voted in favor of the Merger (which included the reclassification of the Class B stock into 100,000

shares of the new common stock). Less than 1% of all the shares entitled to vote were voted against the Merger. (Finding 35, Apx. 54).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

Minnie Krantman, the plaintiff below, is a resident and citizen of the State of Iowa. Defendant, Liberty Loan Corporation, is a Delaware corporation and a citizen of that State. Defendants, I. H. Levy (Chairman of the Board of Liberty), D. J. Harris (Director of Liberty) and David S. Nerad (Secretary of Liberty) are residents and citizens of the State of Illinois. Defendants, David B. Lichtenstein (President of Liberty) and Lyle S. Woodcock (a Director of Liberty) are residents and citizens of the State of Missouri. The amount of the controversy for which the plaintiff sues derivatively in the right of and for the benefit of Liberty Loan Corporation, and the aggregate amount in controversy for which the plaintiff sues as representative of all former Class A common stockholders of Liberty, each exceeds, exclusive of interest and cost, the sum of $3,000.00 (Finding 1, Apx. 41).

Jurisdiction in the United States District Court for the Northern District of Illinois, Eastern Division, is based on Title 28, U. S. C. Section 1332 (a) (1).

ARGUMENT.

It is respectfully submitted that the Court of Appeals for the Seventh Circuit in affirming the trial court's decision decided an important state question in a way in conflict with the applicable Delaware law, both in connection with the Employees' Stock Purchase Plan and in connection with the reclassification of the Class B shares of Liberty.

The trial court's second conclusion of law is as follows:

> "2. Since Liberty Loan Corporation is a Delaware corporation, the issues presented in this action are governed by the law of the State of Delaware."

The trial court then proceeded to ignore the clear and apposite authorities from the State of Delaware on the issues raised. The Court of Appeals similarly neglected to consider in its opinion a single authority on the substantive law of the case either from Delaware or from any other jurisdiction.

The Delaware law on the issuance of stock in circumstances comparable to the Employees' Stock Purchase Plan is that stock issued without adequate consideration is a gift of corporate assets, a fraud upon the corporation and remediable in a stockholders' derivative suit.

The authoritative Delaware case, decided by the Supreme Court of Delaware in 1952 is *Kerbs* v. *California Eastern Airways, Inc.*, 90 A. 2d 652, reargument denied 91 A. 2d 62. Defendant, an operator of aircraft, went through bankruptcy and was reorganized. At a meeting of the Board in October, 1950, a stock option plan and profit-sharing plan was adopted, and a special meeting of the

stockholders called for the purpose of submitting the stock option plan for ratification. A majority of the stock of the defendant corporation was voted in favor of the stock option plan.

The Court said at pages 656-657:

> "The validity of a stock option plan under which selected personnel of a corporation may acquire a stock interest in the corporation depends directly upon the existence of consideration to the corporation and the inclusion in the plan of conditions, or the existence of circumstances which may be expected to insure that the contemplated consideration will in fact pass to the corporation. *Rosenthal* v. *Burry Biscuit Corp.*, 30 Del. Ch. 299, 60 A. 2d 106, *Sandler* v. *Schenley Industries, Inc.*, Del. Ch., 79 A. 2d 606.
>
> * * *
>
> "We think that the stock option plan, as adopted by the directors and as ratified by the majority of the stock, is deficient because it is not reasonably calculated to insure that the defendant will receive the contemplated benefits."

The Delaware Supreme Court held the option plan voidable in a derivative suit by a minority stockholder.

In *Frankel* v. *Donovan* (Del. Chan. Feb. 10, 1956) 120 A. 2d 311 the plaintiff sued to enjoin the granting of options by the corporate defendant to fifty of its executive employees, contending that such options were gifts by the corporation to its officers and employees. The options were approved by the vote of a majority of the stockholders. The court said at page 314:

> "If the options were a gift of corporate assets, the option plans must give way to stockholder attack."

The court specifically found that there was no legal consideration for the granting of the options and that such

grant constituted a gift of corporate assets and was properly subject to attack by the plaintiff.

The court said at page 316:

> "It is not only implicit in amended Section 157 of the Delaware Corporation Law that options must be issued for consideration and in Section 122(9) of the same law that corporate gifts may be made solely for the public welfare or for charitable, scientific or educational purposes, but there is also an accepted corporate rule that majority stockholders have no power to give away corporate property against the protest of the minority, *Rogers* v. *Hill*, 289 U. S. 582, 53 S. Ct. 731, 77 L. Ed. 1385."

The Constitution of the State of Delaware, Article IX, Section 3 provides:

> "Article IX, Section 3. Issuance of Stock. No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."

Section 122 (9) of the Delaware Corporation Law relied upon in *Frankel* v. *Donovan*, 120 A. 2d 311, provides as follows:

> "Section 122. Specific Powers.
>
> Every corporation created under the provisions of this Chapter shall have power to * * * (9) Make donations for the public welfare or for charitable, scientific or educational purposes; * * *"
>
> (Vol. 4, Delaware Code Annotated, Title 8, Section 122(9).

In *Rosenthal* v. *Burry Biscuit Corp.*, 30 Del. Ch. 299, 60 A. 2d 106, (1948) a stock option plan was invalid because there was no showing that it was granted either to induce the optionee to enter the Company's employ or to remain in it.

Under the Delaware Constitution and under Delaware decided cases, the corporation has no power to give away corporate assets in a stock option and purchase plan. Before the plan will be approved by the courts there must be some contract of employment or other valuable consideration passing to the corporation for the preference in price to the employee or some reasonable guarantee that the corporation will receive the contemplated benefit of the continued services of the employee.

The same basic rules are followed in other jurisdictions. See *Felsenheld* v. *Block Brothers Tobacco Co.*, 119 West Va. Rep. 167 at 178, 192 S.E. 545 at 550; *Holthusen* v. *Edward G. Budd Mfg. Co.*, 52 F. Supp. 125, with which compare *Holthusen* v. *Edward G. Budd Mfg. Co.*, 53 F. Supp. 488.

No consideration has been paid to Liberty for the difference between the Plan price of 17 and the market price of 21-1/8. Neither Lichtenstein nor any other participants in the Plan entered into any employment contract with Liberty (Apx. 11, 20). No non-compete agreement was executed by Lichtenstein (Apx. 20). By the time of the trial several of the participants in the Plan had left Liberty (Apx. 11).

It is respectfully submitted that it is clear under the applicable Delaware law that the participants in the Employees' Stock Purchase Plan, particularly Lichtenstein, the fiduciary President and Director, should be compelled to pay the difference between the market price and the price of shares purchased under the Plan.

While it is true that the law on the reclassification of 7500 Class B shares to 100,000 common shares is not governed by any Delaware case as directly in point as those cited in connection with the Employees' Stock Purchase

Plan, it is respectfully submitted that the basic rule which prohibits the issuance of stock except for a valuable consideration applies with equal force. Article IX, Section 3 of the Delaware Constitution, Section 122 (9) of the Delaware Corporation Law and the Delaware cases cited in connection with the Employees' Stock Purchase Plan are applicable in connection with the reclassification of stock. See also *Rogers* v. *Hill*, 289 U. S. 582, at 591, 77 L. Ed. 1385 at 1391; *Ellis* v. *Penn Beef Co.*, 9 Del. Ch. 213; and *State ex rel. Weede* v. *Bechtel*, 239 Ia. 1298, 31 N.W. 2d 853 on the right to remedy a gift of corporate assets to a fiduciary.

The only substantial difference between the Class B and the Class A shares before reclassification was that the Class B shares controlled the corporation through their power to elect a majority of the board. When the 7500 class B shares were exchanged for 100,000 common shares, 92,500 shares were issued without any consideration passing to the corporation, unless adequate consideration existed in the 7500 Class B shares relinquishing their power of control. Those 7500 B shares, with an equity of only $125,353 and a yearly income of $11,250 could not by any normal procedures of evaluation or distribution of corporate property be the equivalent in value of 100,000 common shares in the book value of $1,388,049 and a market value (as of November 3, 1954) of $2,393,000. It is respectfully suggested that the only way that the 7500 B shares can equal the value of 100,000 shares is if the power of control inherent in the 7500 shares is misused to appropriate more than the fair share of corporate property to the owners of those shares.

It is respectfully submitted that some consideration of the applicable law on this transaction should have been given by the Court of Appeals.

It is respectfully submitted that the Court of Appeals also completely ignored the applicable principles of law and decided cases relating to the fiduciary duty of defendant Lichtenstein in connection with both the Employees' Stock Purchase Plan and the reclassification of the Class B shares. The cases *Pepper* v. *Litton*, 308 U.S. 295 at 306, 60 S.Ct. 238 at 245, 84 L. Ed. 281 at 289; *Lebold* v. *Inland Steel Co.*, 125 F. 2d 369 at 373 (C.C.A. 7th, 1941) cert. den. 316 U.S. 675; and *Zahn* v. *Transamerica Corp.*, 162 F. 2d 36 (C.C.A. 3rd, 1947) consider the duties of fiduciary officers, directors and controlling stockholders in somewhat comparable transactions.

In addition the fiduciary obligation of Levy in receiving for himself and his family $1,700,000 for Clas B stock having a book value of only $121,024 was completely ignored by the Court of Appeals.

The recent case of *Perlman* v. *Feldmann*, 219 F. 2d 173 (C.A. 2d 1955) cert. den. 349 U. S. 952, and the earlier cases of *Moulton* v. *Field*, 179 Fed. 673 (C.C.A. 7th) cert. den. 219 U. S. 586; *Insuranshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (D. C. Pa. 1940), and *Commonwealth Title Company* v. *Seltzer*, 227 Pa. 410 (76 Atl. 77) all recognize the basic rule that the officer and director who sells corporate control with the knowledge that the purchaser of that control will abuse it to unjustly enrich himself at the expense of the corporation is liable for excessive consideration received in that sale. It is respectfully suggested that some consideration should have been given by the Court of Appeals to the law applicable to this transaction.

In holding that the decision of the trial court must be affirmed on the basis of Rule 52a, the Federal Rules of Civil Procedure, 28 U.S.C., it is respectfully submitted that the Court of Appeals completely overlooked the fact that there was no dispute as to any basic evidentiary fact,

and that the only questions presented were questions of law as to whether the acts of the various defendants were fraudulent and in violation of their fiduciary duties. Substantially all the facts were developed by defendant's own documents or by testimony from the individual defendants. The evidence for the plaintiff was documentary in large part. Plaintiff personally had no knowledge of the facts involved and the accountant testifying for the plaintiff based all his computations upon the plaintiff's published statements which were in evidence. It is respectfully submitted that it is a gross misinterpretation of Rule 52a to apply it to the circumstances of the case at bar.

CONCLUSION.

While petitioner recognizes that there are cases which more urgently require the attention of the Supreme Court than this one, it is respectfully suggested that there are good reasons that the writ of certiorari should be granted.

The State of Delaware frequently is used as a state of incorporation for corporations operating throughout the United States. The practice of granting stock options or adopting stock purchase plans for the benefit of corporate executives has become widespread in our economy. The case at bar raises important questions as to the latitude which corporate fiduciaries have in voting such stock purchase plans for their own benefit.

The case also raises important questions as to the rights and obligations of a fiduciary in the sale of corporate control. Are not those officers and directors selling corporate control and those purchasing such control under duties as fiduciaries to the corporation and its stockholders: the seller to see that his price for the transfer

and the plans of the transferee are such that the corporation will not be despoiled, the purchaser not to use his newly acquired control to issue corporate stock to himself without adequate consideration passing to the corporation?

Finally, it is respectfully suggested that an even more important issue is presented by this case. Are not the courts, particularly the Courts of Appeal, under an obligation to pass upon a case properly presented to it by some consideration of the legal issues involved? Is this not a minimum requirement if confidence of litigants in our system of justice is to be maintained? If cases are to be decided without reference to the appropriate statutes, case law or principles of law involved, is not our system of justice bound to come into disrespect? It is most earnestly submitted that the decision involved herein in its complete neglect of the legal issues has so far departed from the accepted and usual course of judicial procedures as to constitute a gross miscarriage of justice and to call for exercise of the Supreme Court's power of supervision.

It is respectfully submitted that for the foregoing reasons this Court should grant this petition for certiorari.

Respectfully submitted,

IRWIN J. ASKOW
RICHARD JAMES STEVENS
BURTON H. YOUNG
Counsel for Petitioner

ASKOW and STEVENS
7 South Dearborn Street
Chicago 3, Illinois
BURTON H. YOUNG
7 South Dearborn Street
Chicago 3, Illinois

APPENDIX.

Opinion of the Court of Appeals.

Minnie KRANTMAN, Plaintiff-Appellant,

v.

LIBERTY LOAN CORPORATION et al., Defendants-Appellees.

No. 11903.

United States Court of Appeals
Seventh Circuit.

July 29, 1957.

FINNEGAN, Circuit Judge.

There is absent from this appeal any assertion that the findings of fact made by the district judge sitting without a jury are unsupported by the evidence. Under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C., "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." After our study of this record and the parties' briefs we leave those findings undisturbed.

Minnie Krantman, plaintiff, owns 25 shares of Class A stock of the defendant, Liberty Loan Corporation, existing under Delaware laws, engaged in the small loan business. Plaintiff, an Iowa resident, acquired that stock September 16, 1954 at 23½ per share through her attorney who placed an order with a broker. Liberty issued its certificate on October 18, 1954 for those shares in plaintiff's name. Krantman's purchase took place approximately sixty days after defendant, I. H. Levy (President, Director and controlling stockholder of Liberty until July 19, 1954) together with several business associates and members of his family consummated a sale to Key Finance Company of their holdings of 7241 shares out of a total issue of 7500 Class

"B" shares of Liberty. In addition to the corporate defendant and Levy, other officers and directors of Liberty were joined as individual defendants.

This is a stockholder's derivative suit commenced October 20, 1954 on Liberty's behalf and its Class A stockholders complaining of, and challenging: (1) the Employees' Stock Purchase Plan; (2) the issuance of 92,500 shares of common stock allegedly without adequate consideration in the exchange of 7500 shares of Class B stock for 100,000 shares of common stock; (3) the receipt by I. H. Levy, Chairman of the Board, who was Liberty's president and controlling stockholder, of an allegedly excessive consideration in his sale of controlling shares to David B. Lichtenstein's group; and (4) the payment of a salary of $40,000 per year to Levy as part of the consideration for Levy's sale of Liberty shares. Plaintiff's original complaint was followed up with a Supplemental Complaint, filed November 17, 1954, and an Amendment to Complaint and Supplemental Complaint, filed November 17, 1954, and an Amendment to Complaint and Supplemental, filed September 12, 1955. Claims against I. H. Levy personally were first asserted in plaintiff's last pleading. After Krantman presented her evidence the trial judge correctly, we think granted defendants' motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C. In relevant part, that Rule governs this case: "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff * * *. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." A final decree was entered dismissing plaintiff's action for want of equity and this appeal followed.

Our recent discussion of Rule 41(b) in Penn-Texas Corporation v. Morse, 7 Cir., 1957, 242 F.2d 243 explains the impact of, and how, that Rule controls this appeal. The "Contested Issues" and "Propositions of Law Relied Upon" by Krantman in his brief are simply generalizations of law without bearing on the facts reported by the trial judge. The facts of this case are reported below as Krantman v. Liberty Loan Corporation, D.C. Ill. 1956, 152 F. Supp. 705.

All judgments, orders and decrees itemized in plaintiff's notice of appeal are hereby affirmed in all respects.

Judgment affirmed.

SWAIM, Circuit Judge.

I concur in the result.

PLAINTIFF'S EXHIBIT 23

LIBERTY LOAN CORPORATION

1. Based on June 30, 1954 audit included in proxy statement.

	Shares	Equity	Book Value per share
90¢ convertible preferred series	13,103	$ 209,648.00	$16.00*
1952 convertible preferred series	59,816	957,056.00	16.00*
Common — Class A	385,675	6,344,525.00	16.45
Common — Class B	7,500	123,378.00	16.45
Total Equity		$7,634,607.00	

2. Based on June 30, 1954 audit after conversion of preferred to Class A stock during 6 months ended December 31, 1954.

Actual conversion to Class A —	58,342 shares	
Actual redemption of preferred stock —	5,604.6 shares	
Total equity	$7,634,607.00	
Less redemption @ $16.00	89,673.60	
	$7,544,933.00	
Add employees' stock	93,600.00	
	$7,638,533.40	

	Shares	Equity	Book Value per share
Actual Class A remaining	444,017	$7,421,158.00	$16.71
Employees' stock purchase	93,600	92,023.00	.98
Class B	7,500	125,353.00	16.71
Total Equity		$7,638,534.00	

* Redemption value.

LIBERTY LOAN CORPORATION

3. Based on December 31, 1954 Baumann, Finney & Co. audit.

	Shares	Equity	Book Value per share
Common	444,017	$6,163,174.00	$13.88
Employees' Stock Plan	93,600	76,424.00	.816
Former Class B	100,000	1,388,049.00	185.07
Metropolitan	20,469	284,120.00	13.88
Metro	2,730	37,894.00	13.88
Total Equity		$7,949,661.00	

PLAINTIFF'S EXHIBIT 29

Record of money paid to dealers on 173,091 shares of Liberty Loan.

DEALER	Shs. in Individual's name	Money	Shs. in Firm name	Money	Total Paid
A. C. Allyn & Co.	995	$ 149.25		$	$ 149.25
Bache & Co.	50	7.50			7.50
M. H. Bishop & Co.	1,020	153.00			153.00
Blair & Co.	742	111.30			111.30
Boenning & Co.	2,807	421.05	698	104.70	525.75
Campbell, McCarty & Co.	9,310	1,396.50			1,396.50
Chase, Whiteside, Warren & Sears	255	38.25			38.25
Chilson, Newberry & Co.	2,212	331.80			331.80
Craigmyle & Co.	100	15.00			15.00
Cruttenden & Co.	1,585	237.75			237.75
Curtis, House & Co.	10	1.50			1.50
Dempsey-Tegeler Co.	5,239	785.85	975	146.25	932.10
Eastman, Dillon & Co.	100	15.00			15.00
A. G. Edwards & Sons	3,587	538.05			538.05
Estabrook & Co.	235	35.25			35.25
Fahnestock & Co.	200	30.00	25	3.75	33.75
Fairman, Harris & Co.	31,560	4,734.00			4,734.00
First Florida Investors	45	6.75			6.75
First Securities of Chicago	628	94.20			94.20
Folger, Nolan—W. B. Hibbs	200	30.00			30.00
French & Crawford	1,545	231.75			231.75
Fulton Reid	106	15.90			15.90
Fusz-Schmelzle	657	98.55			98.55
Glaser, Vogel	850	127.50			127.50
Hanrahan & Co.	410	61.50			61.50
Harris, Upham & Co.	300	45.00			45.00
Harvey, Klein & Co.	400	60.00			60.00
Barrett Herrick & Co.	195	29.25			29.25
Wayne Hummer & Co.	25	3.75			3.75
Johnston, Lemon & Co.	2,955	443.25	117	17.55	460.80
Edward D. Jones & Co.	19,247	2,887.05	1,046	156.90	3,043.95
Kerwin, Fotheringham & Co.	1,020	153.00	300	45.00	198.00
King & Co.	120	18.00			384.75
The Marshall Co.	2,565	384.75			384.75
J. P. Marto & Co.	450	67.50			67.50
McCourtney, Breckenridge	260	39.00			39.00
Metropolitan St. Louis Co.	6,498	974.70			974.70
Mid Continent Securities	1,575	236.25			236.25
Morfeld, Moss & Hartnett	2,895	434.25			434.25
Newhard, Cook & Co.	11,162	1,674.30	2,404	360.00	2,034.90
David A. Noyes & Co.	50	7.50			7.50
W. R. Olsen & Co.	50	7.50			7.50
Paine, Webber, Jackson & Curtis	150	22.50			22.50
Prescott, Wright, Snider Co.	749	112.35			112.35
Rambo, Close & Kerner	310	46.50			46.50
Ranson-Davidson & Co.	60	9.00			9.00
Reinholdt & Gardner	800	120.00			120.00
Irving J. Rice & Co.	300	45.00	412	61.80	106.80
Riter & Co.	14,437	2,165.55	2,110	316.50	2,482.05
Wm. C. Roney & Co.	150	22.50			22.50
Scherck, Richter Co.	8,014	1,202.10			1,202.10
Scott, Horner & Mason	170	25.50			25.50

DEALER	Shs. in Individual's name	Money	Shs. in Firm name	Money	Total Paid
Shaughnessy & Co.	100	15.00			15.00
Shillinglaw, Bolger & Co.	100	15.00			15.00
K. M. Simon & Co.	85	12.75			12.75
Stifel, Nicholaus & Co.	4,365	654.75			654.75
Stirling, Morris & Bousman	2,280	342.00			342.00
Stix & Co.	386	57.90			57.90
Strader, Taylor & Co.	17	2.55			2.55
Straus, Blosser & McDowell	1,840	276.00			276.00
Sutro Bros.	275	41.25			41.25
Wm. H. Tegtmeyer & Co.	40	6.00			6.00
Thayer, Baker & Co.	100	15.00			15.00
Albert Theis & Sons	1,153	172.95			172.95
Lewis D. Thill	1,585	237.75			237.75
Union Security Co.	250	37.50			37.50
G. H. Walker & Co.	5,834	875.10	1,144	171.60	1,046.70
O. H. Wibbing	2,650	397.50			397.50
C. T. Williams & Co.	3,025	453.75			453.75
H. P. Wood & Co.	100	15.00			15.00
Woodward-Elwood & Co.	20	3.00			3.00
F. S. Yantis	300	45.00			45.00
TOTALS	163,860	$24,579.00	9,231	$1,384.65	$25,963.65

Liberty Loan Corporation-Dealer Solicitation Account

Check from Lib. Loan dtd. 11/24/54			$44,839.10
Check from Lib. Loan dtd. 12/3/54			1,979.40
Check from Lib. Loan dtd. 12/9/54			2,458.20
Pd. by R & Co. on 173,091 Shs.		$25,963.65	
Service Fee for Sol. Managers		22,500.00	
East Wisconsin — No Agreement	$1.50		
Merrill Lynch — No Agreement	30.00		
Walston & Co. — No Agreement	18.00		
Webber-Simpson — No Agreement	7.50		
Chauncey Shull — Not a dealer	4.50		
Newberry & Co. — Not a dealer	9.00		
Orstim — Not a dealer	7.50		
Boettcher — Not Blue Skyed State	58.50		
Chas. Cheney — Not NASD	7.50		
J. C. Kahn — Not NASD	15.00		
Geo. Wallace — Not NASD	7.50		
Excess payment by Lib. Loan	646.55		
Check to Lib. fr. R: & Co. dtd 2/28/55		813.05	
		$49,276.70	$49,276.70

STATUTE INVOLVED.

The full text of Volume 4, *Delaware Code Annotated*, Title 8, Section 262; Section 262 Delaware Corporation Law is as follows:

§262. Payment for stock or membership of person objecting to consolidation or merger

(a) When used in this section, the word "stockholder" means and includes a holder of stock in a stock corporation and also a member of a non-stock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also the membership or membership interest of a member of a non-stock corporation.

(b) The corporation resulting from or surviving any consolidation or merger shall within 10 days after the date on which the agreement of consolidation or merger has been filed and recorded, notify each stockholder in any corporation of this State consolidating or merging, who objected thereto in writing and whose shares were not voted in favor of such consolidation or merger, and who filed such written objection with the corporation before the taking of the vote on such consolidation or merger, that the agreement has been filed and recorded. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If any such stockholder shall within 20 days after the date of mailing of the notice demand in writing, from the corporation resulting from or surviving such consolidation or merger, payment for his stock, such resulting or surviving corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the value of his stock on the date of the recording of the agreement of consolidation or merger, exclusive of any element of value arising from the expectation or accomplishment of such consolidation or merger.

(c) If during the period of 30 days provided for in subsection (b) of this section, the corporation and any

such objecting stockholder fail to agree as to the value of such stock, any such stockholder, or the corporation resulting from or surviving such consolidation or merger, may by petition filed in the Court of Chancery within four months after the expiration of the period of 30 days demand a determination of the value of the stock of all such objecting stockholders by an appraiser to be appointed by the Court.

(d) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall within ten days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered mail to the corporation and to the stockholders shown upon the list at the addresses therein stated, and notice shall also be given by publishing a notice at least once a week for two successive weeks, the second publication to appear at least one week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware. The Court may direct such additional publications of notice as it deems advisable. The forms of the notices by mail and by publication shall be approved by the Court.

(e) After the hearing of such petition the Court shall determine the stockholders who have complied with the provisions of this section and become entitled to the valuation of and payment for their shares, and shall appoint an appraiser to determine such value. Such appraiser may examine any of the books and records of the corporation or corporations the stock of which he is charged with the duty of valuing, and he shall make a determination of the

value of the shares upon such investigation as to him seems proper. The appraiser shall also afford a reasonable opportunity to the parties interested to submit to him pertinent evidence on the value of the shares. The appraiser, also, shall have such powers and authority as may be conferred upon masters by the rules of the Court of Chancery or by the order of his appointment.

(f) The appraiser shall determine the value of the stock of the stockholders adjudged by the Court of Chancery to be entitled to payment therefor and shall file his report respecting such value in the office of the Register in Chancery and notice of the filing of such report shall be given by the Register in Chancery to the parties in interest. Such report shall be subject to exceptions to be heard before the Court both upon the law and facts. The Court shall by its decree determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided, to the stockholders entitled thereto by the resulting or surviving corporation upon the transfer to it of the certificates representing such stock, which decree may be enforced as other decrees in th Court of Chancery may be enforced, whether such resulting or surviving corporation be a corporation of this State or of any other state.

(g) At the time of appointing the appraiser or at any time thereafter the Court may require the dissenting stockholders to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings, and if any stockholder fails to comply with such direction the Court may dismiss the proceedings as to such stockholder.

(h) The cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, but exclusive of fees of counsel or of experts retained by any party, may on application of any party in interest be determined by the Court and taxed upon the parties to

such appraisal or any of them as appears to be equitable, except that the cost of giving the notice by publication and by registered mail hereinabove provided for shall be paid by the corporation. The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto.

(i) Any stockholder who has demanded payment of his stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the date of the recording of the agreement) unless the appointment of an appraiser shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such stockholder shall with the written approval of the corporation deliver to the corporation a written withdrawal of his objections to and an acceptance of such consolidation or merger, in any of which cases the right of such stockholder to payment of his stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such dissenting stockholders would have been converted had they assented to the consolidation or merger shall have the status of authorized and unissued shares of the surviving or resulting corporation.

J. N. T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

REPLY BRIEF OF PETITIONER.

IRWIN J. ASKOW
RICHARD JAMES STEVENS
BURTON H. YOUNG
Counsel for Petitioner

ASKOW AND STEVENS
BURTON H. YOUNG
7 South Dearborn Street
Chicago 3, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

REPLY BRIEF OF PETITIONER.

The two briefs in opposition to the Petition for Writ of Certiorari are replete with suggestions that the plaintiff purchased her shares of stock after the transactions in question and for the purpose of bringing the instant litigation. The decision of the trial court was *not* based on any such finding. Nowhere in the very extensive findings below is there any finding of fact that the plaintiff was not a stockholder at the time of the transaction in question, and none of the conclusions of law is that the

plaintiff is barred from recovery, either for failure to comply with Rule 23(b) or because she was not a stockholder at the time of the transaction. On the contrary, plaintiff was a stockholder at the time of the transactions in question. The merger and reclassification of stock was adopted by the stockholders at the meeting of November 3, 1954. (Apx. 54) The Employees' Stock Purchase Plan was subject to the approval of the stockholders, which occurred on November 3, 1954. (Apx. 49, 54) Final payment to the Levy group of the purchase price of 7241 Class B shares was made on February 25, 1955. (Apx. 4)

When plaintiff purchased her shares on September 16, 1954, through her attorney, who had handled her affairs since her husband's death, and who had been instructed by the plaintiff to invest her funds for her benefit (Apx. 18), neither she nor her attorney had any knowledge of the fraud being perpetrated on the stockholders. Such information was first received in the Proxy Statement issued on September 21, 1954 (Apx. 53), five days *after* the plaintiff purchased her stock.

THE EMPLOYEES' STOCK PURCHASE PLAN.

Respondents argue that the Class A shares issued under the Employees' Stock Purchase Plan were different from the other Class A shares, so that the price of the other Class A stock is no measure of the fair price of the Employees' Purchase Plan stock. The chief difference in the two Class A stocks is that the Employees' Purchase Plan shares carried full voting rights upon the payment of only 1/17th of the purchase price, $1.00 per share. These voting rights are particularly significant when the holders of this block of 93,600 shares retained voting control of the corporation after the issuance

of this stock. (Apx. 25) If the voting control existing in the 7500 Class B shares makes the Class B shares worth 13⅓ times more than the Class A shares, certainly the voting control existing in the 93,600 Employees' Stock Purchase shares issued to Lichtenstein and his nominees, makes those shares at least equal in value to the value of other Class A shares. Respondents claim the voting control of the corporation was worth $1,700,000 when it resided in the Class B shares. Therefore are not the 93,600 shares issued for $1.00 down to perpetuate working control in Lichtenstein (Apx. 25) worth far more than the other Class A shares?

Not one of the cases cited by the respondents involved a stock option or a stock purchase plan in any way similar to the Employees' Stock Purchase Plan here involved.

THE RECLASSIFICATION OF STOCK.

The cases cited by the respondents in connection with the reclassification of 7500 Class B shares to 100,000 common shares clearly recognize the rule that when the reclassification is so unfair as to amount to constructive fraud, the courts will act. (See *Bailey* v. *Tubize Rayon Corp.*, 56 F. Supp. 418 at 422; *MacFarlane* v. *North American Cement Corp.*, 16 Del. Ch. 172, 157 A. 396 at 400; *Barrett* v. *Denver Tramway Corp.*, 53 F. Supp. 198 at 201.)

In the case at bar, Liberty Loan Corporation was in no serious financial difficulty which required any radical changes in the capital structure. The obvious purpose for the reclassification was the issuance of 100,000 shares to the Lichtynstein group so they could recoup from the corporation the $1,700,000 spent in the purchase of the Class B shares, plus a profit. Admittedly, the new com-

mon stock gained technical voting control of the corporation by the reclassification. Yet, the new 100,000 shares issued to the former Class B stockholders (mainly Lichtenstein's group) when coupled with the 93,600 shares acquired by Lichtenstein and his nominees under the Employees' Stock Purchase Plan, firmly perpetuated the working control of Lichtenstein's group. (Apx. 25) Certainly the nominal change in voting control was not such as to entitle former Class B shareholders to 100,000 shares of stock with a total equity of $1,388,049 in exchange for the 7500 Class B shares with an equity of only $125,353. If this transaction does not constitute fraud such as to move a Court of Chancery to action, it is difficult to see what breach of fiduciary duty would so move the courts.

THE SALE OF CONTROLLING SHARES FOR AN EXCESSIVE CONSIDERATION.

Respondent Levy argues that the case at bar cannot come within the "looting" doctrine that the sellers are liable for the excessive consideration received by them when they know the purchasers intend to divert corporate assets to their own benefit. Levy's own testimony is that the reclassification of the 7500 B shares into 100,000 shares was discussed on May 26, 1954, well before the sale of Levy's B shares to the Lichtenstein group (Apx. 8). As Levy had actual knowledge that the purchasers intended to reclassify the 7500 B shares to 100,000 common shares, the case fits clearly within the "looting" doctrine.

It is respectfully submitted that it is perfectly apparent that the Court of Appeals did not consider and apply either the Delaware law or the law of any other jurisdiction, and that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

IRWIN J. ASKOW,
RICHARD JAMES STEVENS,
BURTON H. YOUNG,
Attorneys for Petitioner,
Minnie Krantman.

IRWIN J. ASKOW,
RICHARD JAMES STEVENS,
BURTON H. YOUNG,
7 South Dearborn Street,
Chicago 3, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

BRIEF OF RESPONDENT, I. H. LEVY IN OPPOSITION

FRANK P. POWLE,

WALTER J. DEFFENBACHER,

Counsel for Respondent, I. H. Levy

INDEX

PAGE

QUESTIONS PRESENTED AS TO RESPONDENT I. H. LEVY 1

STATEMENT OF THE CASE 2

ARGUMENT 4-11

I.

Since petitioner purchased her stock approximately 60 days after the sale of said 7,241 shares of Class B stock was consummated, she has no right to attack the sale 4

II.

Petitioner should not be permitted to go behind the findings of fact and contrary thereto postulate the violation of fiduciary relationships which the Court found did not occur 5

III.

There is no showing that the Court of Appeals refrained from considering the law relating to the alleged fiduciary obligation of I. H. Levy in selling his B shares 10

CONCLUSION 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

BRIEF OF RESPONDENT, I. H. LEVY IN OPPOSITION

I. H. Levy concurs in and adopts the brief filed in this Court by his co-respondents.

This brief is directed only to those issues which concern I. H. Levy individually and personally.

QUESTIONS PRESENTED AS TO RESPONDENT I. H. LEVY

1. Whether the petitioner, who first became a shareholder in respondent, Liberty Loan Corporation, through the purchase of its shares approximately 60 days after I. H. Levy sold his B shares therein can maintain a derivative action attacking such sale.

2. Assuming petitioner may maintain such action, whether she is entitled to have this Court set aside the findings of fact made by the Trial Court sitting without a jury, which she did not attack in the Court of Appeals as unsupported by the evidence, and which that Court left undisturbed.

3. Whether the Court of Appeals refrained from considering the law relating to the alleged fiduciary obligation of respondent I. H. Levy in selling his said B shares and by so refraining caused such a gross miscarriage of justice as to call for this Court's power of supervision.

STATEMENT OF THE CASE

I. H. Levy adopts the restatement of the case in the brief filed in this Court by his co-respondents, with the following additions:

This is a stockholder's derivative suit brought by petitioner, who purchased 25 Class A shares of respondent Liberty Loan Corporation, (hereinafter referred to as Liberty), on September 16, 1954 (Pet. 6, Apdx. 2a).* Liberty issued its certificate to petitioner for said shares on October 18, 1954 and this suit was instituted on October 20, 1954. The alleged purpose of the suit was to secure on behalf of Liberty equitable relief from the frauds alleged to have been perpetrated against it and its Class A shareholders by the individual defendants.

A claim was first asserted against I. H. Levy personally in an amendment to complaint and supplemental complaint filed September 22, 1955, (Pet. Apdx. 2a) in which it was prayed that Liberty recover of him any sums paid to him, his family and associates as part of the purchase price of 7,241 shares of Class B stock; also that Liberty recover from him that part of the purchase price of said shares

* Reference is to the petition filed herein and the appendix thereto.

which "represents the sale of the control of the corporation" (R. 134).

On July 19, 1954, Key Finance Company, pursuant to an option previously given, purchased unconditionally from I. H. Levy and members of his family, and became the owner of said 7,241 shares of Class B Common Stock without any commitment or agreement by any one that the Class B Common Stock would be reclassified or be exchanged for any other stock of Liberty. The aggregate purchase price was $1,700,000 (Fdg. 14). The negotiations leading up to the purchase and its subsequent consummation were at arm's length and not as a part of any scheme (Fdg. 12).

The case was tried in the District Court without a jury. After plaintiff had completed the presentation of her evidence the District Court allowed defendants' motion to dismiss in accordance with Rule 41(b) of the Rules of Civil Procedure holding that upon the facts and the law plaintiff had shown no right to relief. A final decree was entered dismissing the action for want of equity. The Court delivered an oral opinion which stated findings and conclusions (Aplt. Apdx. 37-39). Also, after a hearing upon proposed findings and conclusions and upon objection thereto, the Court stated formal findings and conclusions as required by Rule 41(b) (Aplt. Apdx. 41-59).

ARGUMENT

I.

Since petitioner purchased her stock approximately 60 days after the sale of said 7,241 shares of Class B stock was consummated, she has no right to attack the sale.

Petitioner's attack upon the action of the Court below insofar as I. H. Levy is concerned relates only to the sale by him and his family of said 7,241 shares of Class B Stock. The 5th question petitioner asserts as presented for review is "Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligation of defendant, I. H. Levy" with respect to said sale (Pet. 4). In petitioner's argument it is stated "In addition the fiduciary obligation of Levy in receiving for himself and his family $1,700,000 for Class B Stock having a book value of $121,024 was completely ignored by the Court of Appeals. . . . It is respectfully suggested that some consideration should have been given by the Court of Appeals to the law applicable to this transaction" (Pet. 19).

The undisputed evidence is that plaintiff purchased 25 shares of Liberty class A stock by having her lawyer place an order therefor with a broker on September 16, 1954 (Fdg. 2).

The sale of the 7,241 shares of "B" stock was provided for in option agreements dated July 8, 1954, by which the sellers became irrevocably committed to sell in the event the options were exercised. The options were in fact exercised, the consideration paid and the stock irrevocably delivered to the purchaser July 19, 1954 (Fdg. 14).

Rule 23(b), Federal Rules of Civil Procedure, provides that:

> "In an action brought to enforce a secondary right on the part of one or more shareholders * * * the com-

> plaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law * * *."

In accord with this rule it has been held repeatedly that a stockholder suing in a derivative capacity cannot maintain an action attacking a transaction which occurred before he purchased his stock: *Weinhaus* v. *Gale*, 237 F. 2d, 197 (C.A. 7), *Henis* v. *Compania Agricola des Guatemala*, 210 F. 2d 950 (C.A. 3), *Pergament* v. *Frazer*, 93 F. Supp. 9, 12-13, *Levitan* v. *Stout*, 97 F. Supp. 105, 118.

II.

Petitioner should not be permitted to go behind the findings of fact and contrary thereto postulate the violation of fiduciary relationships which the Court found did not occur.

As above noted petitioner's complaint with respect to I. H. Levy is limited to the sale by him and his family of 7,241 Class B shares of Liberty with a book value of $121,024 for $1,700,000 (Pet. 4, 19).* Pursuant to rule 41(b) Federal Rules of Civil Procedure the Court made findings which under rule 52 "shall not be set aside unless clearly erroneous."

In the opening paragraph of its opinion the Court of Appeals said (Pet. 1(a)):

> "There is absent from this appeal any assertion that the findings of fact made by the District Judge sitting without a jury are unsupported by the evidence. * * * After our study of this record and the parties' briefs, we leave those findings undisturbed".

---

* Petitioner does not here mention the claim made below that the retention of I. H. Levy and 2 members of his family in the employment of Liberty after the sale of said "B" shares was a part of the consideration received for said shares. The Trial Court's findings (40-42) uncontradicted by any evidence disposed of this claim.

In *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, this Court said (275):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact findings cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Petitioner has not attempted to point out a single error in the findings of fact.

Relative to the value of the class B stock the Trial Court found, on undisputed evidence produced by the plaintiff (Fdg. 7):

> "On several occasions prior to July, 1954, I. H. Levy had negotiations with various companies concerning the disposition by him and members of his family of their Class B shares in Liberty. In 1951 Family Finance Corporation was willing to pay $1,800,000 for the shares of Class B stock. In the latter part of 1950 and the early part of 1951 American Investment Company was willing to pay $1,700,000 for said shares of Class B stock. In 1953 American Investment Company again wished to purchase said Class B shares and offered $1,500,000, which amount was not acceptable to said I. H. Levy. Commencing in March, 1954, negotiations were had between I. H. Levy and certain directors of Liberty with representatives of Seaboard Finance Company, looking toward an exchange of stock of the two corporations under which the Class B shares of Liberty would be exchanged for 60,000 shares of a preferred stock of Seaboard, convertible on a share for share basis into Seaboard common stock within one year. Based upon the then market value of the Seaboard common stock, this would have produced something over $1,500,000 for the holders of the Class B common stock of Liberty but without any income tax being payable on the transaction by the holders of the Class B common stock. These negotiations and offers tended to establish a market price for the Class B common stock in the range from $1,500,000 to $1,800,000."

Relative to the sale of the Class B stock the Trial Court likewise found, (Fdg. 14):

> "On July 8, 1954, options to purchase an aggregate of 7,241 shares of Class B common stock were granted to said Key Finance Company by I. H. Levy and his wife, Louis Strilky (his brother-in-law), Harriet Levy (his daughter), and H. H. Levy (his brother) and members of the latter's family. These options related only to an outright purchase, *without any contingency, condition or limitation*, from I. H. Levy and the other grantors of said options of the 7,241 shares of Class B common stock of Liberty, for the aggregate price of $1,700,000. On July 19, 1954, Key Finance Company exercised said options and purchased unconditionally and became owner of said 7,241 shares of Class B common stock *without any commitment or agreement by anyone that the Class B common stock would be reclassified or exchanged for any other stock of Liberty.*" (Emphasis supplied.)

Referring to the negotiations leading up to the execution of the options and the sale pursuant thereto the Court also found (Fdg. 12):

> "These negotiations were carried on and the subsequent purchase was consummated at arm's length and not as a part of any scheme between Lichtenstein and I. H. Levy, as charged in the Complaint or otherwise."

Thus, on the Findings of Fact the sale of the Class B shares by I. H. Levy and his family was at a price within the range of the Market, was not a part of any scheme and was without any agreement respecting reclassification or exchange of the same. It was an arm's length transaction without any contingencies, conditions or limitations and there was no evidence of fraud committed against Liberty or its Class A shareholders. The sale in no way enriched Levy at Liberty's expense or injured Liberty or its shareholders.

On the basis of such findings none of the cases cited by

petitioner *in support of her suggestion* "that some consideration should have been given by the Court of Appeals to the law applicable to this transaction" (Pet. 19) indicate that the Court of Appeals did not give full consideration to the applicable law.

All of those cases involved situations in which at the time the sale was made the sellers knew or by exercise of reasonable diligence should have known that the purchasers intended to deal with the *corporate assets* in such a way as to dissipate them or to divert them to their own benefit. These cases are generally referred to as falling within the "looting" doctrine. In the instant case neither the sale of the "B" shares to Key Finance Company nor the subsequent recapitalization of Liberty in any way dissipated or diverted the *corporate assets* from Liberty. In fact, the record evidence amply demonstrates to the contrary that since the sale the assets of the corporation and its business have both been substantially expanded.

Perlman v. *Feldmann*, 219 Fed. (2d) 173 (CA 2, 1955) strongly relied upon by the plaintiff in the District Court and in the Court of Appeals is clearly distinguishable from the instant case and falls within the scope of the "looting" doctrine referred to above. That case was a derivative action by minority stockholders of a steel corporation which sought an accounting for illegal gains which the defendants enjoyed upon a sale of the controlling interest in the corporation. The sale was made during a period of steel shortage to a group which paid a bonus over and above the market price to the controlling interest in order to assure themselves of a supply of steel.

The court in the *Feldmann* case recognized that the majority stockholder becomes liable to the minority stockholders and to the corporation only when and to the extent that he has participated in or aided a diversion of or injury

to the corporate assets. Beginning at page 178, the court said:

> "We do not mean to suggest that a majority stockholder cannot dispose of his controlling block of stock to outsiders without having to account to this corporation for profits or even never do this with impunity when the buyer is an interested customer, actual or potential; for the corporation's product. But when the sale necessarily results in a sacrifice of this element of corporate good will and consequent unusual profit to the fiduciary who has caused the sacrifice, he should account for his gains. So in a time of market shortage, where a call on a corporation's product commands an unusually large premium, in one form or another, we think it sound law that a fiduciary may not appropriate to himself the value of this premium."

The *Feldmann* case is further distinguishable by reason of the fact that the majority shares were sold to the purchasers at a considerable advance over and above the market price, a situation which is not present in this case.

Insuranshares Corp. v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (DC Pa. 1940) and the other cases relied upon by petitioner are all cases in which the seller of the controlling stock knew of the "looting" or had reason to know at the time he sold his controlling shares at a premium that the purchasers of those shares would dissipate or misappropriate the corporate assets. In *Levy* v. *American Beverage Corporation*, *supra*, 38 N.Y.S. 2d 517, beginning at page 525, the court made this distinction.

In the instant case, Levy did not receive any consideration above the market value for his stock. He did not receive any corporate assets, did not have knowledge or any reason to believe that the purchasers would dissipate or divert corporate assets and, in fact, no such dissipation or diversion occurred.

On the findings of fact the cases relied on by Petitioner are entirely inapplicable.

In finding nothing obnoxious in the sale of the B stock the Court of Appeals followed the general rule as stated in an annotation in 50 ALR 2d 1146-58, entitled, "Dominant shareholder's accountability to minority for profit, bonus, or the like received on sale of stock to outsiders," as follows:

> "A dominant shareholder has as much right as any other shareholder to sell his stock and to sell it at whatever price he may agree upon, without having to account to minority stockholders for any profit or bonus, so long as such profit or bonus is not acquired as a result of a secret agreement as to which he was under a duty to inform the other shareholders, or under such other circumstances as would amount to a breach of his fiduciary duty."

Typical of the cases there reviewed are *Tryon* v. *Smith*, (Ore. 1951) 229 P2d. 251 and *Levy* v. *American Beverage Corp.*, 38 NYS 2d 517 (App. Div. 1942).

III.

There is no showing that the Court of Appeals refrained from considering the law relating to the alleged fiduciary obligation of I. H. Levy in selling his B shares.

The trial court fully and accurately found the facts surrounding the sale of the B shares. The Court of Appeals refused to disturb the facts so found. Petitioner has not pointed out one single error in those findings. On the findings, petitioner had no right to complain of the sale. The law is perfectly clear that the sale was not open to attack. In sustaining defendant's motion to dismiss under Rule 41(b) the trial court held, "that upon the facts and the law the plaintiff has shown no right to relief." The affirming of that judgment by the Court of Appeals involved the same holding. Petitioner has not cited one case which indicates that the holding below was erroneous. The decision of the court below is manifestly correct, and certainly there was no

such deviation from the accepted course of the law as to call for the exercise by this Court of its power of supervision.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

FRANK E. FOWLE,
WALTER I. DEFFENBAUGH,
Attorneys for Respondent, I. H. Levy.

NOV 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner.

vs.

LIBERTY LOAN CORPORATION, A DELAWARE CORPORATION, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK AND DAVID S. NERAD,

Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION.

MARTIN J. MCNALLY,
THOMAS D. NASH, JR.,
111 West Washington Street,
Chicago, Illinois,
Attorneys for David B. Lichtenstein and Lyle S. Woodcock.

ANDREW J. DALISTREAM,
FREDRIC H. STAFFORD,
ALBERT E. HALLETT,
231 South LaSalle Street,
Chicago, Illinois,
Attorneys for D. J. Harris and David S. Nerad.

JOHN F. CASHEN, JR.,
64 West Randolph Street,
Chicago, Illinois,
Attorney for Liberty Loan Corporation.

INDEX.

	PAGE
Questions Presented	2
Restatement	3-8
Argument	9-22
Conclusion	23

CITATIONS.

Cases.

Bailey v. Tubize Rayon Corporation, 56 F. Supp. 418, 422, 425 ..... 13, 16

Barrett v. Denver Tramway Corporation, 53 F. Supp. 198, 201 (D. C., Del., 1943), aff'd. 146 F. 2d 701 16

Coles v. Vadesco Sales Corporation, 18 Del. Ch. 47, 156 A. 183 16

Gottlieb v. Heyden Chemical Corp., 33 Del. Ch. 177, 91 A. 2d 57 ..... 11, 20

Gropper v. North Central Texas Oil Company, 114 A. 2d 231 (Del. Ch. 1955) 11, 20

Hottenstein v. York Ice Machinery Corporation, 136 F. 2d 944 ..... 13, 14

Kaufman v. Shoenberg, 33 Del. Ch. 211, 91 A. 2d 786, 790 ..... 11, 20

Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 90 A. 2d 652 ..... 11, 20

MacCrone v. American Capital Corporation, 51 F. Supp. 462, 469 ..... 13, 16

MacFarlane v. North American Cement Corporation, 16 Del. Ch. 172, 157 A. 396, 400 ..... 16, 17

Perlman v. Feldman, 219 F. 2d 173 19

Porges v. Vadesco Sales Corporation, 27 Del. Ch. 127, 32 A. 2d 148, 151 ..... 12, 13, 16

Schiff v. RKO Pictures Corp., 104 A. 2d 267, 271 (Del. Ch., 1954) 11, 20

Statutes.

Del. Code Anno., Title 8 §§ 251(c), 252(c) 12, 15, 19

Rules.

Federal Rules of Civil Procedure, Rules 41(b), 52(a) .. 2, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 572.

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, A DELAWARE CORPORATION, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK AND DAVID S. NERAD,

Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION.

For the convenience of this Court, counsel for five of the respondents have joined in this one brief.

Said respondents respectfully submit that the decision of the Court of Appeals here challenged has not decided any important state question in a way in conflict with applicable state law, that its decision is not such as to call for the exercise of this Court's power of supervision and that petitioner has completely failed to demonstrate any special or important reason why this Court should allow the writ.

THE QUESTIONS PRESENTED FOR REVIEW BY PETITIONER.

The "questions" presented by the petitioner do not fairly arise from the opinion of the Court of Appeals or the facts in this record.

The Court of Appeals did not interpret Rule 52(a) of the Federal Rules of Civil Procedure as requiring it to affirm because there was no conflict as to any evidentiary fact.

The remaining "questions" petitioner presents for review are slanted factual queries that completely ignore the facts in this case as found by the trial court, which findings are not challenged here by petitioner and were not challenged in the Court of Appeals.

RESTATEMENT OF THE CASE.

The omissions and inaccuracies in petitioner's Statement of the Case necessitate the following restatement of material facts found by the trial court.

Liberty Loan Corporation (hereinafter called "Liberty") was organized in 1932. In 1954, it had outstanding both Class A and Class B common stock, approximately a half million Class A shares and 7500 Class B shares (Fdg. 3, Apx. 42). Its charter vested in the Class B shareholders the right to elect a majority of its Board of Directors and all other voting power (Fdg. 5, Apx. 43). More than half of these Class B shares were owned by the respondent I. H. Levy and his wife and through such ownership they controlled Liberty (Fdg. 6, Apx. 43).

Prior to July 19, 1954, Levy had negotiations with various companies concerning the sale of these shares. One prospective purchaser was willing to pay $1,700,000.00, another, $1,800,000.00. In the early part of 1954 negotiations were conducted by a third corporation and Levy for an exchange of the Class B shares which would have resulted in the Class B shareholders receiving the equivalent in shares of over $1,500,000.00, without any income tax being payable by them on the transaction. These and other negotiations tended to establish a market price for the Class B shares in a range from $1,500,000.00 to $1,800,000.00 (Fdg. 7, Apx. 43-44).

The respondent I. H. Levy was the founder and chief executive officer of Liberty. In 1954, he was reaching an advanced age (Fdg. 8, Apx. 44). The management of Liberty then lacked depth of adequate personnel and Liberty was beginning to decline in business volume and earnings, in contrast to the continued and increased growth of its

competitors (Fdg. 39, Apx. 56). Levy was concerned about attracting and retaining excellent management for Liberty but the chief impediment was the control vested in the Class B shares, which rendered the tenure of such management insecure (Fdg. 8, Apx. 44).

The respondent Lichtenstein was generally regarded as one of the top executives in the small loan field and Levy sought to have him join Liberty (Fdgs. 9, 10, Apx. 44-45). A group of investors organized Key Finance Company (not a party to this action) and on July 19, 1954, purchased the 7,241 Class B shares of Liberty owned by I. H. Levy and members of his family (Fdgs. 13, 14, Apx. 46). The "purchase was consummated at arm's length" (Fdg. 12, Apx. 45-46) and was made unconditionally and without any commitment or agreement by anyone that the Class B shares would be reclassified or exchanged for any other stock of Liberty (Fdg. 14, Apx. 46-47).

Upon the sale of such Class B shares to Key Finance Company, four of the directors resigned and four new directors, including Lichtenstein and two other executives he brought to Liberty, were elected to fill the vacancies on the seven man board (Fdg. 15, Apx. 47). On July 26, 1954, the new board, among other things, unanimously adopted an Employees' Stock Purchase Plan providing for the purchase by key employees of shares of Class A stock of Liberty (Fdgs. 15, 16, 17, Apx. 47). Both the Plan itself and the resolution of the directors adopting it provided that it be submitted to the stockholders and rescinded unless approved by a majority of each class of the then outstanding stock (Fdg. 21, Apx. 49).

Each employee participating in this Stock Purchase Plan was required to execute an unconditional written agreement to purchase a certain number of shares on an installment basis and such shares were assessable and restricted as to dividends and liquidation rights until fully paid for

and were non-transferable until thirty days after that time. No employee purchaser could accelerate any instalment under the Stock Purchase Plan until Liberty had net earnings for a six-months period amounting to 90¢ a share on all of its outstanding stock (Fdgs. 18, 19, 20, Apx. 48). The stipulated price of $17.00 per share was reasonably related to the then market value of fully paid and unrestricted shares of Liberty's Class A stock and to the latter's then book value of $16.45 (Fdgs. 18, 19, 20, 24, Apx. 48-49).

The petitioner made no proof that the action of the Board of Directors in voting the adoption of the Employees' Stock Purchase Plan, in recommending it to the stockholders, in allocating shares to employees under the Plan or in fixing the price for such shares was not in good faith or in any way fraudulent or unfair (Fdg. 25, Apx. 50). The directors adopted the Plan in order to attract and keep new management for Liberty, and, more specifically, the new management headed by respondent Lichtenstein, to encourage executive and other employees to invest in Liberty and to furnish greater incentives for outstanding services to the corporation (Fdg. 22, Apx. 49).

Full information as to this Employees' Stock Purchase Plan was given to all stockholders of Liberty, in a clear and understandable manner, by the proxy statement dated September 21, 1954, which accompanied the formal notice calling a stockholders' meeting for November 3, 1954, to vote on the Plan. There were no misrepresentations and no omission of any material fact in the proxy statement (Fdg. 34, Apx. 53-54).

At the stockholders meeting on November 3, 1954, 382,740 shares of the Class A common stock, present in person or by proxy, which was 86.2% of all the Class A stock (excluding stock sold pursuant to the Employees Stock Purchase Plan which did not vote) voted in favor

of the Employees Stock Purchase Plan, and 98.8% of the Class B stock did likewise. Only 3.5% of the Class A and none of the Class B stock voted against it (Fdg. 35, Apx. 54).

At the July 20, 1954 meeting of the directors of Liberty, they had also authorized the president to enter into an agreement for the merger of two other small loan companies with Liberty. As of September 1, 1954, Liberty and these two other companies entered into a formal Plan and Agreement of Merger effective only upon adoption by the stockholders of the three companies involved, and Liberty's directors approved and authorized its submission to all stockholders (Fdg. 26, Apx. 50-51).

This proposed Merger provided, among other things, for a reclassification of the 7500 shares of the Class B common stock of Liberty into 100,000 shares of common stock of the surviving corporation, Liberty, thus eliminating the voting control which had been vested in the Class B stock. This action was necessary to attract, keep and build up top-flight management and key personnel for Liberty. Full information as to said proposed Merger and reclassification was presented in a clear and understandable manner in the proxy statement which was sent to all stockholders and there were no misrepresentations of any kind and no omission of any material fact (Fdgs. 28, 29, 33, 34, Apx. 51-54).

It was provided in the Plan of Merger that the 100,000 shares of common stock of the surviving corporation exchanged for the Class B common stock of Liberty would be restricted as to dividends, each share being entitled to only 7½% of the dividends declared and paid on other shares of common stock until for a period of six months the consolidated net income of Liberty (as the surviving corporation) and its subsidiaries was not less than 90¢ per share on all fully paid shares, plus a proportionate amount applicable to all partially paid and assessable

shares. No such restrictions were imposed on the old Class A shares or upon those issuable to the stockholders of the two merging companies (Fdg. 32, Apx. 53).

The reclassification of the 7500 shares of Class B into 100,000 of the new common was not fraudulent, and the rate of exchange, based on the price Key Finance Company paid the I. H. Levy family group for their Class B stock, was reasonably related to the market price and book value of the Class A shares during the period preceding the purchase (Fdgs. 30, 31, Apx. 52-53).

The Merger, including the reclassification of the Class B stock into 100,000 shares of new common, was overwhelmingly approved by the shareholders on November 3, 1954. 90.7% of all of Liberty's shares entitled to vote, voted for and less than 1% voted against it (Fdg. 35, Apx. 54).

Full information concerning the solicitation by security dealers of proxies in favor of the Merger was given to the stockholders in the proxy statement, including the amount of the dealers' fees. The payment of such fees was not fraudulent, unreasonable or improper (Fdg. 37, Apx. 55). There is no evidence that the vote cast by any stockholder in favor of the Merger was in any way affected by or the result of the payment of fees or compensation to any soliciting dealer, or that the vote of any stockholder was cast other than as the result of his or her free and independent best judgment. The form of proxy provided for voting for or against the Merger. All proxies received were voted in accordance with the instructions of the stockholders (Fdg. 38, Apx. 55).

With the entry of the Lichtenstein executive management, the salaries of the old officers, including I. H. Levy, were reduced to such an extent that Liberty was able to pay the salaries of its new top management personnel without increasing the total cost of executive salaries (Fdg. 41, Apx. 56). The compensation paid to I. H. Levy, H. H.

Levy and Louis Strilky, the old management group, under the new regime, was compensation for services actually rendered by them and was "not part of the purchase price of the Class B shares sold to Key Finance Company by J. H. Levy" and his family group. The two Levys and Strilky rendered substantial services in their respective positions (Fdg. 42, Apx. 56-57).

Under the new management headed by Lichtenstein, and following the adoption of the Employees Stock Purchase Plan and the Merger with the elimination of voting control in the Class B shares, Liberty has enjoyed considerable growth. Its business volume has increased more than 75%, its bank credit $9,000,000.00. The scope and size of the operations have so expanded that it has moved from thirtieth to tenth place in the industry. Its earnings are 50% higher than they have ever been. While the entire industry in which Liberty competes has increased some 26%, Liberty has increased about 67%. The public market value of its stock has increased more than 50% (Fdgs. 43-46, Apx. 57-58).

The plaintiff's 25 shares of Class A stock were acquired by one of her attorneys of record in the trial court (but not here) (Fdg. 2, Apx. 41). Said attorney had been apprised by his stock broker on September 1, 1954, that there was going to be a Liberty merger and the Class B stock of Liberty eliminated (Aplee. Apx. 7-8) and the terms of the proposed Merger, reclassification of the Class B stock into 100,000 shares of new common and Employees' Stock Purchase Plan were described in Moody's issue of September 14, 1954, and in Standard & Poor's of September 13, 1954 (Fdg. 36, Apx. 54-55). Three days later, on September 16, 1954, plaintiff's 25 shares of stock were ordered. Her certificate is dated October 18, 1954 and, although petitioner resided in Iowa, the instant suit was filed in Chicago, Illinois, on October 20, 1954, two days later (Fdgs. 1, 2, 36, Apx. 41-52, 54-55).

ARGUMENT.

The Employees' Stock Purchase Plan.

Petitioner is completely mistaken in her assertion that the Court of Appeals has decided an important state question in connection with the Employees' Stock Purchase Plan in a way in conflict with applicable Delaware law.

Petitioner's contention is that because the fixed price of new shares issued under said Plan was below the market price of Liberty's previously issued Class A shares and the participating employees entered into no employment contracts or "non-compete" agreements, Liberty received no consideration for such spread, and the difference therefore constituted a gift of corporate assets which such participants should be compelled to repay.

The **first** fallacy in petitioner's contention is that the new shares issued under the Employees' Stock Purchase Plan and the previously issued Class A shares were not comparable.

The previously issued Class A shares were fully paid and non-assessable, were freely assignable and transferable, could be sold at any time on the open market, or otherwise, and carried no restriction as to dividends or liquidation rights. On the other hand, the new shares issued under the Employees' Stock Purchase Plan were issued as partially paid and assessable shares, could only receive dividends and only had liquidation rights in proportion to the amount paid in upon such shares, and were not assignable nor transferable for 30 days after they had become fully paid and non-assessable by virtue of the completion of the installment requirements specified in the Plan (Fdgs. 18, 19, Apx. 48).

The installment provisions of the Plan and the employees' purchase agreement required that the employee purchaser's first payment be applied proportionately on all shares purchased. The second year and succeeding yearly installment payments were applied to the payment of the balance due on as many shares as such payments would cover. No employee purchaser could accelerate any installment under the Stock Purchase Plan (and thereby secure fully paid, full dividend and fully marketable shares) until Liberty had net earnings for a 6-months' period amounting to 90¢ a share on all of its outstanding stock (Fdgs. 18, 19, 20, Apx. 48).

In view of these restrictions on the new shares issued under the Employees' Stock Purchase Plan, it is futile for petitioner to argue that the value of those shares should be measured by the market price on July 20, 1954, of the wholly unrestricted, full dividend, freely assignable and transferable Class A shares previously issued.

The second fallacy in petitioner's contention is her reliance upon decisions holding that, where the employee enters into no contract of employment or "non-compete" agreement, the granting of an "*option*" to him to purchase the corporation's stock is invalid because no consideration has passed to the corporation. Such cases are not pertinent here because, in them, although the employee, if it later proves favorable to him, *can* exercise his "option" to purchase, he is not *required* to do so and thus, in the absence of a contract of employment or non-compete agreement, no consideration at all has passed to the corporation for the granting of the option. In the case at bar, on the contrary, the Plan was strictly a "*purchase*" and not an "*option*" plan and each participating employee entered into a firm and unconditional undertaking with Liberty to purchase a fixed number of its shares on an installment plan at a fixed price, *regardless* of whether the market

price of its stock went up or down, and this valuable consideration passed immediately to the corporation.

Furthermore, in adopting said Employees' Stock Purchase Plan, the directors expressly provided that it would be rescinded unless approved by a majority of each class of the corporation's outstanding stock (Fdg. 21, Apx. 49) and, at the November 3, 1954 meeting, 86.2% of the Class A stock (excluding shares issued under the Plan, which did not vote on the proposition) and 98.2% of the Class B stock voted in favor of said Plan and only 3.5% of the Class A and none of the Class B stock voted against it (Fdg. 35, Apx. 54).

Under Delaware law, where a majority of the shareholders approve or ratify any action taken by directors in which some or all of the directors are personally interested, the burden of proof is upon an objecting stockholder to establish that no person of ordinarily sound business judgment would be expected to consider the transaction fair (*Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57 (1952); *Gropper* v. *North Central Texas Oil Company*, 114 A. 2d 231 (Del. Ch. 1955); *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 91 A. 2d 786, 790; *Schiff* v. *RKO Pictures Corp.*, 104 A. 2d 267, 271). Even in *Kerbs* v. *California Eastern Airways, Inc.*, 33 Del. Ch. 69, 90 A. 2d 652, relied upon by the petitioner, the court expressly recognizes the foregoing rule in remanding that case to determine whether the profit-sharing plan there involved had been ratified by a majority of the stock.

The overwhelming approval by the shareholders of Liberty of the Employees' Stock Purchase Plan, under Delaware law, imposed upon the petitioner the burden of proving that *no person* of ordinarily sound business judgment would be expected to consider $17.00 per share a fair price for shares issued under the Plan. Petitioner made no such proof, and she does not contend that she did. She stood

solely upon a mistaken assumption that the price of the new shares issued under the Plan (subject to all the restrictions and limitations provided therein) should have been the same as the market price, on the date the merger was approved by the Board of Directors, of the unrestricted Class A shares previously issued and to remain outstanding. Petitioner cannot now expect this Court to assume that all of the shareholders of Liberty who voted approval of the Plan were wanting in ordinarily sound business judgment.

Reclassification of the Class B Shares.

The conversion of the 7500 Class B shares into 100,000 shares of the new common stock of Liberty was not a gift by Liberty of 92,500 shares as petitioner contends, but a lawful reclassification of stock by the shareholders of Liberty pursuant to the provisions of the applicable Delaware statute governing corporate mergers. Under that statute the reclassification was effected by the shareholders, not the directors (Del. Code Anno., Title 8, § 251).

Petitioner blandly assumes that the Class B shares should have been exchanged for the new common on a share-per-share basis, and that therefore, since the B shareholders received 100,000 shares, 92,500 shares were issued without any consideration passing to Liberty. Petitioner's assumption ignores the established value of the control vested in the Class B shares and the many advantages to the Class A shareholders of the merger which were pointed out and time has confirmed.

Delaware law recognizes the distinctive and substantial value of voting control. In *Porges* v. *Vadsco Sales Corporation*, 21 Del. Ch. 127, 32 A. 2d 148, where holders of the old common stock, which had no book value at all and would have received nothing upon a liquidation, but held voting

control, received stock valued at some $719,000 in the new corporation resulting from the merger, the court, in refusing to enjoin the proposed merger, said, p. 151:

> "To arrive at a judgment of the fairness of the merger, all of its terms must be considered. Complainant focuses his attention exclusively on the resultant changes in book value without taking into account other consequences of the merger with respect to the rights conferred by the two classes of stock. Complainant ignores the important fact that the old common stockholders have voting control, and that by the merger, control would pass to the holders of the old preferred stock. * * *."

In *Bailey* v. *Tubize Rayon Corporation*, 56 F. Supp. 418, the Delaware U. S. District Court had before it the claim that a plan involving reclassification of shares was so unfair as to be fraudulent because the old common stock holding voting control was "under water" to the amount of $12.96 per share yet received new stock of a value of $14.14 per share. The court refused to interfere with the reclassification, saying, p. 425:

> "* * * The important thing is that the Common Stock, as such, gave up its voting control; that is the thing of value. *Cf. Maddock et al.* v. *Vorclone Corp.*, 17 Del. Ch. 39, 43, 147 A. 255, 256."

Answering the complaint of a plaintiff stockholder that the Class B stock with voting control received better treatment in a reclassification than it should have, the U. S. District Court in Delaware said, in *MacCrone* v. *American Capital Corporation*, 51 F. Supp. 462, 469:

> "* * * But, what is more important in weighing the allocation of the Class B Common Stock of Pacific is that this stock, at present has voting control of that company. * * *"

The Court of Appeals for the 3rd Cir. in *Hottenstein* v. *York Ice Machinery Corporation*, 136 F. 2d 944, passed

upon a reclassification of shares between preferred and common stockholders. The court found that the equity in the corporation was about $4,300,000.00, and the accumulated dividends alone on the preferred stock amounted to approximately $4,600,000.00 (p. 945). The prior claims of the preferred stockholders totaled $10,647,090.00, representing the par value of the preferred plus the cumulative dividends accrued thereon (p. 946). The plan of recapitalization, effected through a merger, resulted in giving the common stockholders 17% of the stock of the surviving corporation. In the reclassification, the voting power of the holders of the preferred was increased from 24.8% to 83.2%. The Court of Appeals, in upholding the dismissal of the complaint by the trial court, said that under all the circumstances of the case the reclassification was fair.

By reason of the foregoing authorities, it is established that under Delaware law voting control is a very valuable right, and the courts will not interfere with a reclassification which gives the holders of voting control a substantial equity in the corporation for its surrender, even though prior to the reclassification they had no equity in the corporate assets.

In the *instant* case, the holders of the Class B with absolute voting control surrendered it for about one-seventh of the total shares of Liberty issued pursuant to the merger and one-seventh of the vote. Moreover, unlike the facts in the Delaware cases where the consideration given for surrender of voting control was upheld, the Class B shareholders in this case not only had an equity in the corporate assets before the exchange but a market value had been established for the Class B shares, and Key Finance Company exchanged its Class B shares in the reclassification for the equivalent of what it had paid the Levy family group for them.

Furthermore, the 100,000 shares of the common stock of

the surviving corporation exchanged for the Class B common stock of Liberty were restricted as to dividends, each share being entitled to only 7½% of the dividends declared and payable on other shares of such common stock until for a period of six months the consolidated net income of Liberty (as the surviving corporation) and its subsidiaries was not less than 90¢ per share on all fully paid shares, plus a proportionate amount applicable to all partially paid and assessable shares. No such dividend restrictions were imposed on the old Class A shares or upon those issuable to the stockholders of the two merging companies (Fdg. 32, Apx. 53).

The net effect of such restriction was to limit the dividends on the 100,000 shares received in exchange for the former Class B common stock to the same dividends the holders of such stock would have received if they had continued to own their Class B common stock until such time as the established earnings of the Company for a six month period should have been not less than 90¢ per share on all fully paid shares of common stock outstanding (including the additional 100,000 shares of common stock), which would reasonably insure the continuation of payment of the pre-existing annual dividend of $1.50 per share on all outstanding common stock (Fdg. 20, 32; Apx. 49, 53).

Where, as in this case, the reclassification is a part of a merger, the Delaware statute requires that two-thirds of all of the shares of Liberty, Class A and Class B, voting together, vote affirmatively (Del. Code Anno., Title 8, Secs. 251(c), 252(c)). Here the two-thirds requirement was far exceeded; the affirmative vote being over 90% (Fdg. 35, Apx. 54).

It is well settled under Delaware law that where the required majorities take action under appropriate statutory provisions to reclassify or rearrange stockholders' rights, a

presumption arises in favor of the action taken and its good faith, and the dissenting stockholder has the burden of proving that such action was either actually fraudulent or so unfair as to amount to constructive fraud. The federal courts have consistently found this to be the rule in Delaware and have enforced it:

In *Barrett* v. *Denver Tramway Corporation*, 53 F. Supp. 198 (D. C., Del. 1943) aff'd 146 F. 2d 701, the court said, p. 201:

> "* * * where required statutory majorities have the right to take action looking to reclassification or rearrangement of stockholders' rights, a presumption arises of bona fides of purpose with a resultant burden on dissidents to prove that the action is so palpably unfair as to amount to a constructive fraud * * *."

The foregoing rule is repeated in substantially the same language in *MacCrone* v. *American Capital Corporation*, 51 F. Supp. 462 (D. C., Del. 1943).

In *Bailey* v. *Tubize Rayon Corporation*, 56 F. Supp. 418 (D. C., Del. 1944), the court said, p. 422:

> "Under the Delaware decisional and statutory law an amendment (*reclassification of shares*) will not be condemned unless it is so unfair as to amount to constructive fraud.
>
> "* * * Unless the act of the majority of the directors and stockholders is so palpably unfair as to afford no basis for a difference of opinion among reasonable men, the court should not substitute its judgment for that of the stockholders and directors * * *" (Parenthetical comment ours.)

The rule is reiterated in *Porges* v. *Vadsco Sales Corporation*, 27 Del. Ch. 127, 32 A. 2d 148; *Coles* v. *National Cash Credit Association*, 18 Del. Ch. 47, 156 A. 183, and *MacFarlane* v. *North American Cement Corporation*, 16 Del. Ch. 172, 157 A. 396. In the latter case, the court said, p. 400:

"In the absence of any evidence of fraud, bad faith or intentional wrongdoing, there must be a presumption that those favoring the merger are acting honestly, according to their best judgment and for each of the companies that seek to consolidate.

"If the consolidation proposed is unfair to a stockholder but not so grossly unfair as to warrant injunctive relief, he is not without remedy. Under Section 61 of the General Corporation Law (as amended by March 2, 1927, 35 Del. Laws, c. 85) any stockholder who objected to the merger may demand of the new company, and require it to pay him, the fair value of his stock as of the date of the consolidation."

The petitioner in this case could have had that relief, and a quick profit on her stock purchase. She chose instead this expensive lawsuit despite the fact that she owns but 25 shares of Liberty stock, purchased after the merger had been approved by the Board and publicly announced.

In the trial court petitioner offered no proof that the action of Liberty's Board of Directors in approving the Merger, including the reclassification of the Class B shares, and recommending and submitting it to the vote of the stockholders, was not taken in good faith or was in any way fraudulent (Fdg. 27, Apx. 51). Such action was necessary to attract and keep competent officers and key personnel (Fig. 29, Apx. 52) because the chief impediment to attracting top-flight management for Liberty had long been the fact that the vesting of all control in the Class B shares rendered the tenure of any such management insecure (Fdg. 8, Apx. 44). As a consequence, prior to the sale to Key Finance Company, the growth of Liberty had ceased and it had entered into a period of decline and was losing position in the industry in which it was engaged (Fdg. 39, Apx. 56).

The proxy statement which all the shareholders had before they voted not only gave full information as to the

reclassification of the 7500 shares of Class B into 100,000 shares of the new common (Fdg. 34, Apx. 53-54), but it also set forth on a *pro forma* basis the effect the reclassification would have upon the book value of the Class A, as well as the Class B, expressed in dollar figures per share, and the effect the reclassification would have on earnings available for dividends, likewise expressed in dollar figures per share (Fdg. 33, Apx. 53). There were no misrepresentations of any kind in the proxy statement and there was no omission of any material fact and 90.7% of all the shares entitled to vote voted in favor of the reclassification. Less than 1% voted against it (Fdgs. 34, 35, Apx. 53-54).

That the shareholders exhibited good business judgment in voting in favor of the merger is amply demonstrated by the tremendous growth and increased earnings of Liberty and the sustained advance of over 50% in the market value of its shares, which we have previously pointed out in our Restatement of the Case (Fdg. 43, 44, 45, 46, Apx. 57-58).

Petitioner's Charges Against Lichtenstein and I. H. Levy.

Petitioner also asserts that the respondents Lichtenstein and I. H. Levy should personally be held liable on the ground that they violated their fiduciary duties in connection with the transactions here involved.

Petitioner's statement (p. 18) that "the only way that the 7500 B shares can equal the value of the 100,000 shares is if the power of control inherent in the 7500 shares is misused to appropriate more than the fair share of corporate property to the owners of those shares" is but a slightly veiled charge that Levy and his family sold their Class B stock to Key Finance Company knowing that the purchaser intended to misuse the power of control that went

with it, and is apparently made in the hope that this Court will accept it as a factual foundation for the application of the rule laid down in *Perlman* v. *Feldman*, 219 F. 2d 173, and other cases cited at page 19 of her petition. Those cases hold that one with voting control who sells his controlling shares, knowing that the purchaser will abuse the control thus obtained to enrich himself unjustly at the expense of the corporation, is liable for the excessive consideration which the purchaser pays. The petitioner neither adduced, nor attempted to adduce, any evidence whatever that I. H. Levy had any knowledge that Key Finance Company intended to abuse the control attached to the Class B shares or that Key Finance intended to or did in fact abuse that control. The evidence is altogether to the contrary (Fdgs. 25, 27, 47, Apx. 50, 51, 58).

Petitioner's insinuation of intended abuse of control is particularly obnoxious because Key Finance Company surrendered, in exchange for its proportion of the 100,000 shares of new common, the 7241 shares of Class B which it had purchased from the Levy family group and, with such surrender, the voting control of Liberty passed to *all* of its shareholders. How, then, could Key misuse the power of control? If petitioner means to infer that the power was misused for but one thrust—to get the 100,000 shares, petitioner is grossly mistaken. The voting control in the Class B shares did not and could not, under Delaware law, effect their exchange for the 100,000 shares of the new stock because, under the Delaware Statute governing mergers, the exchange had to be and was accomplished by the affirmative vote of two-thirds of the Class A and Class B shares of Liberty, voting together as one class (Del. Code Anno., Title 8, Secs. 251(c), 252(c)). If Key Finance Company *had* sought to abuse the power of control, it *could* have moved for a reclassification *without* or *before* a merger. *Without* a merger! only a bare majority, rather than two-

thirds, would have been necessary to effect the reclassification.

Furthermore, the market price of the Class B stock during the four years prior to the sale by the Levy family group to Key Finance Company has been established as within a range of $1,500,000.00 to $1,800,000.00 (Fdg. 7, Apx. 43-44). Key paid $1,700,000.00 for the Class B shares it purchased from the Levy group and it later exchanged those shares for the approximate equivalent of what it had paid for them (Fdgs. 14, 31, Apx. 46, 52).

As the trial court found, it does not appear from the evidence that any of the defendants entered into a scheme to defraud the former Class A stockholders or Liberty itself; or that any of the defendants, singly or in concert, committed any fraud against the Class A stockholders or Liberty (Fdg. 47, Apx. 58). The cases cited by petitioner at page 18 of her petition do not involve transactions comparable to those that petitioner here attacks. Even though respondents Lichtenstein and Levy were fiduciaries during the course of the transactions, the burden was on petitioner, as an objecting stockholder, to prove the transactions were so unfair that no person of ordinarily sound business judgment would consider them to be fair—because the majority of the stockholders, an overwhelming majority, approved the transactions (*Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57 (1952); *Gropper* v. *North Central Texas Oil Company*, 114 A. 2d 231 (Del. Ch. 1955); *Kerbs* v. *California Eastern Airways*, 33 Del. Ch. 69, 90 A. 2d 652 (1952); *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 91 A. 2d 786, 790 (1952); *Schiff* v. *RKO Pictures Corp.*, 104 A. 2d 267, 271 (Del. Ch. 1954)). The petitioner did not even *attempt* to prove what the Delaware law required of her to sustain her complaint.

The overwhelming majority of the stockholders approved what the petitioner condemns. The trial court found that

full information as to the Employees' Stock Purchase Plan and the reclassification of the B shares for 100,000 shares of the new common of Liberty was given to all stockholders, in a clear and understandable manner by the proxy statement and that there were no misrepresentations and no omission of any material fact in the proxy statement (Fdg. 34, Apx. 53).

The Court of Appeals Did Not Neglect or Ignore the Legal Issues Involved.

Petitioner repeatedly asserts (pp. 2, 19, 20, 21) that, in its decision, the Court of Appeals interpreted Rule 52(a) of the Rules of Civil Procedure as requiring it to affirm the judgment below on the sole ground that the appellant had not challenged the propriety of any of the Findings of Fact made by the trial court, without considering the legal principles applicable to the facts so found, and completely ignored and failed to consider such legal principles (pp. 3, 4, 14, 18, 19, 20, 21). This criticism is unfounded and unjust.

While it is true that, in its opinion, referring to Rule 52(a), the Court of Appeals does point out that the Findings of Fact made by the court below were not challenged by the appellant, it states that, "*after our study of this record* and the parties' briefs, we leave those findings undisturbed." The Court of Appeals further *held* that the Propositions of Law Relied Upon by Krantman were

> "simply generalizations of law without bearing on the facts reported by the trial judge"

and affirmed on the ground that

> "the trial judge correctly, we think, granted defendants' motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure;"

which rule, as this Court well knows, authorizes the trial court, upon motion made at the close of the plaintiff's case, to enter judgment for the defendant where, as here,

> "upon the facts *and the law* the plaintiff has shown no right to relief." (Emphasis added.)

As we have already pointed out, the petitioner's so-called legal propositions and the cases cited in their support had and still have no application whatsoever to the facts of the instant case and, in reaching its decision affirming the trial court, the Court of Appeals did not ignore but on the contrary followed and applied well established Delaware law, which petitioner concedes to be controlling.

The petitioner is not an "old line" Class A stockholder of Liberty. She became one *after* the transactions she attacks were under way and had been publicly announced. The terms of the merger, including the reclassification of the B stock into 100,000 shares common and the Employees' Stock Purchase Plan, were described in Moody's issue of September 11, 1954, and in Standard & Poor's of September 13, 1954 (Fdg. 36, Apx. 54-55). Her twenty-five (25) shares of stock were ordered for her by one of her attorneys of record in the trial court on September 16, 1954, after he had been apprised by his broker that there was going to be a Liberty merger and its B stock eliminated (Fdg. 2, Apx. 41, Appellee's Apx. 7-8). Her certificate for the 25 shares is dated October 18, 1954, and, although she resided in Iowa, this suit was filed in the Federal Court at Chicago, on October 20, 1954, only two days later (Fdgs. 1, 2, Apx. 41-42).

CONCLUSION.

These respondents concur in petitioner's view (p. 20) that "there are cases which more urgently require the attention of the Supreme Court than this one." We respectfully submit that the decision of the Court of Appeals here challenged has not decided any important state question in a way in conflict with applicable state law, that its decision is not such as to call for the exercise of this Court's power of supervision and that petitioner has completely failed to demonstrate any special or important reason why this Court should allow the writ.

Respectfully submitted,

MARVIN J. MCNALLY,
THOMAS D. NASH, JR.,
111 West Washington Street,
Chicago, Illinois,
Attorneys for David B. Lichtenstein and Lyle S. Woodcock.

ANDREW J. DALLSTREAM,
FREDERIC H. STAFFORD,
ALBERT E. HALLETT,
231 South LaSalle Street,
Chicago 4, Illinois,
Attorneys for D. J. Harris and David S. Nerad.

JOHN F. CASHEN, JR.,
64 West Randolph Street,
Chicago, Illinois,
Attorney for Liberty Loan Corporation.